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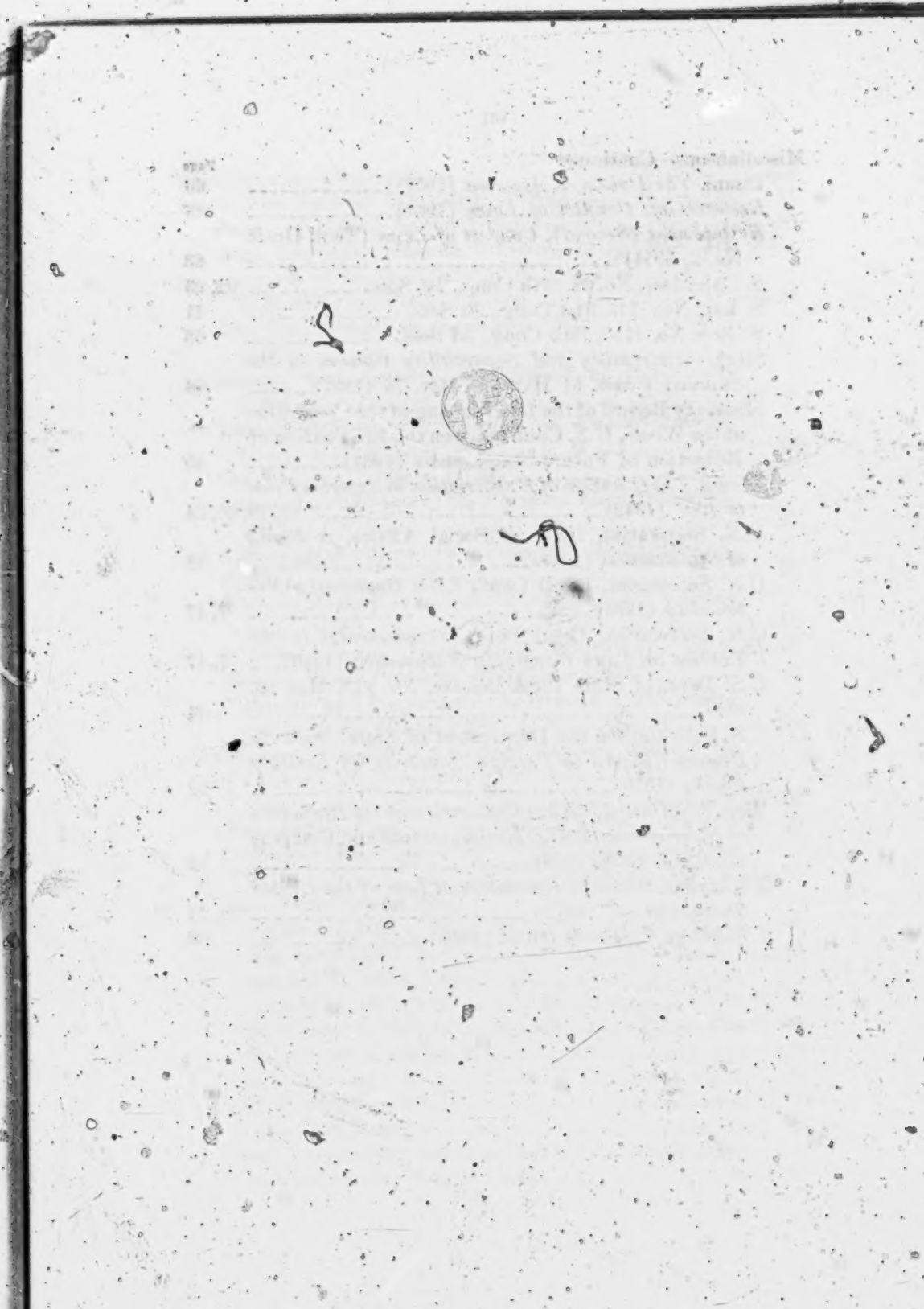

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, APPELLANT

v.

DEAN RUSK, SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the three-judge district court (R. 32–37) is reported at 218 F. Supp. 302.[1]

JURISDICTION

The judgment of the district court was entered on June 7, 1963 (R. 67–68). Notice of appeal to this Court was filed in the district court on June 27, 1963 (R. 68–69), and probable jurisdiction was noted on October 28, 1963 (R. 70). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

[1] The earlier *per curiam* opinion of this Court, remanding the case to the district court for consideration by a three-judge panel, is reported at 372 U.S. 224.

QUESTION PRESENTED

Whether Section 352(a)(1) of the Immigration and Nationality Act, providing for loss of United States nationality by a naturalized citizen who resides continuously for three years or more in the foreign state of which he was formerly a national, is constitutional.

STATUTES INVOLVED

Sections 101, 352, 353, and 406 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 170, 269–270, 73 Stat. 274, 8 U.S.C. 1101, 1484–1485, provide in pertinent part as follows:

> SEC. 101. (a) (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.
>
> * * * * *
>
> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

(2) having a continuous residence for five years in any foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

* * * * *

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States

exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance: *Provided,* That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1), (5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period of [or] periods

totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804 (b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

* * * * *

SEC. 406. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

STATEMENT

Appellant was born of German parents on May 28, 1934, in Bavaria. She was a German national at birth (R. 2). In 1939 or 1940 she came to the United States with her parents to live, and later, in December 1950, she acquired derivative American citizenship through her mother (R. 2, 17).[2] Appellant went

[2] Although the record is silent, the files of the Immigration and Naturalization Service show that appellant's mother acquired American citizenship through naturalization in 1947, that her father never became an American citizen, and that her mother died in 1947 and her father in 1950.

abroad in 1954 and spent the next two years studying in Switzerland and France (R. 2). In February 1956, while in France, she became engaged to a West German national. She returned to the United States in April of that year, remained here for two months, and then departed for West Germany, where she was married in July 1956 and where she has resided ever since (R. 2, 10). In 1959 the United States denied further extension of the passport appellant had held since 1954. The Department of State certified that she had lost her American citizenship under Section 352(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U.S.C. 1484(a)(1), *supra*, p. 2) by residing continuously for three years in the foreign state of which she was a national before her naturalization in the United States (R. 3, 14–16). This decision was affirmed by the Department's Board of Review on the Loss of Nationality in January 1960.

At the present time, appellant is living in a suburb of Cologne, West Germany, with her husband—who is a partner in a law firm located in the city—and her four sons[3] (R. 1, 2, 7, 10). She intends to continue living in Germany—that is "to remain with my husband and our children in Germany where he practices his profession" (R. 8). She explains that (R. 10):

> I intend to live with my husband and to go with him wherever he may be. Since his law practice is in Cologne, it appears likely that he and I will remain there for the indefinite future,

[3] The brief for appellant states that two sons were born after these proceedings commenced (Br. 6).

> although I would hope to be able to go to the United States frequently.

Since her marriage in 1956, she has returned to this country on two occasions: a visit of six weeks in 1957 and another visit in 1960 (R. 10).[4] From the time of the loss of her American citizenship, appellant has resided in West Germany under papers identifying her as a stateless person (R. 4, 11). Her trip to the United States in 1960 was likewise with papers indicating that she was a stateless person. The record does not indicate whether appellant has lost the German citizenship she acquired at birth; whether she has made any claim to German citizenship; or whether she has contested her classification as a stateless person.[5]

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[4] The record is silent as to the second visit to this country, but appellant's brief indicates that such a visit did occur in 1960 (Br. 41).

[5] Under Sections 19 and 25 of Germany's Nationality Act of 22 July 1913 (see U.N. Secretariat, Legal Dept., *Laws Concerning Nationality*, 178–185 (1954)), it appears that a *minor*, unlike an adult, does not divest himself of German citizenship by the act of voluntarily acquiring foreign citizenship; a minor can lose German citizenship only by applying to and securing the approval of a German court of law or the government. Appellant was sixteen years old when she acquired derivative American citizenship (R. 2), and the record makes no mention of her having secured the consent of either a German court or the government to giving up her German citizenship. Under these circumstances, it is doubtful whether she ever lost her status as a German citizen.

Even if appellant were not a German citizen at the present time, she could claim naturalization in Germany on an expedited basis because she is married to a German national. Art. II(1), Third Settlement of the Nationality Questions, Act of 19 August 1957 (see U.N. Secretariat, Legal Dept., *Supplemental to the Volume on Laws Governing Nationality* 43–44 (1959)). See also App. Br. 7.

Appellant's two sons who were born in Germany in 1957 and 1958 are dual nationals, having acquired German citizenship by virtue of their father's nationality and American citizenship through their mother under Section 301(a)(7) of the Immigration and Nationality Act of 1952 (66 Stat. 235, 8 U.S.C. 1401 (a)(7)). The two sons born since the proceedings were commenced are also German citizens through their father. However, their American citizenship, unlike that of their older brothers, depends on the outcome of this case since their American citizenship derives from their mother and they were born after the Department of State had determined that appellant had lost her citizenship.

In February 1960, appellant brought an action in the United States District Court for the District of Columbia to enjoin the Secretary of State from enforcing Section 352(a)(1), and to secure a declaratory judgment that she is a citizen of the United States (R. 1–5). The district court denied her motion to convene a three-judge district court and entered judgment on the pleadings for respondent (R. 27). The court of appeals affirmed *per curiam* (R. 28–29). On writ of certiorari to this Court, judgment was vacated and the cause remanded to the district court for hearing before a three-judge panel, this Court holding that the constitutional questions presented "were not plainly insubstantial" (R. 29–30; 372 U.S. 224). The three-judge district court, one judge dissenting, entered judgment for respondent on the pleadings, holding that Section 352(a)(1) is with-

in Congress' power and is therefore constitutional (R. 32–67; 218 F. Supp. 302).

SUMMARY OF ARGUMENT

The history and background of Section 352(a)(1) show that over a period of many years this government has been seriously concerned by the special problems engendered when naturalized citizens return for a prolonged period to the country of their former nationality. The statute comes within Congress' power over foreign relations because other nations frequently attempt to treat such persons as their own citizens, thus embroiling the United States in serious conflicts when it attempts to afford them protection. Congress could reasonably decide upon the remedy of expatriation, rather than the withdrawal of diplomatic protection, in order to end all American responsibility and involvement. Moreover, Congress can reasonably protest against the tendency of three years' residence in a naturalized citizen's former homeland to weaken his allegiance to the United States. This allegiance is likely to be alienated, at least in substantial part, when a naturalized citizen returns to the country where he was born and spent much of his life.

Hence it is not invidious discrimination for Congress to treat naturalized citizens returning to the country of their former nationality differently from the manner in which it treats native-born citizens. Since the problems are sufficiently general and serious to justify Congress' judgment that this category of naturalized citizens warrants separate treatment, appellant's suggestion that her personal situation does not fall within the reasons for the legislation is

irrelevant. Congress had a right to legislate with respect to the general class without regard to each factual variation. Moreover, considering the particular circumstances in this case, Congress could expatriate persons who return to their former homelands without an intent to return to this country to live, and therefore the statute is constitutional as applied here.

Finally, the statute is not penal, either in intent or in effect. Plainly, naturalized citizens who merely reside for three years in the countries of their origin, have committed no criminal or reprehensible act. The legislative history of Section 352(a)(1) demonstrates unequivocally that, unlike the situation in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, Congress was aiming only to regulate and not to punish. It did so in a manner which has been deemed appropriate not only by this country, but by many others, and is in keeping with our traditional concepts of citizenship.

ARGUMENT

INTRODUCTION

The decisions of this Court firmly establish the power of Congress to enact expatriation statutes. In *Mackenzie* v. *Hare*, 239 U.S. 299, the Court sustained a statute taking away during coverture the citizenship of an American woman who married a foreigner. In *Savorgnan* v. *United States*, 338 U.S. 491, the Court upheld a statute which provided that being naturalized in a foreign state or taking an oath of allegiance to a foreign sovereign would result in loss of citizenship. And in *Perez* v. *Brownell*, 356 U.S. 44, the Court held that it was within the constitutional power

of Congress to make voting in a foreign election an act of expatriation. The power of Congress to enact the statute involved in this case—Section 352(a)(1) of the Immigration and Nationality Act of 1952, providing for the expatriation of naturalized citizens who reside in their countries of origin for three or more years—has not previously been before the Court. While Congress has also provided in Section 352(a)(2) for the expatriation of naturalized citizens who reside in any foreign country for *five* years or more,* the sole issue here is the constitutionality of Section 352(a)(1), which deals with residence in the country of origin.

This Court, in *Perez*, explicitly described the central issue in expatriation cases (356 U.S. at 58):

> The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power [to regulate foreign relations] and the ultimate legislative action.

Similarly, in *Trop* v. *Dulles*, 356 U.S. 86, 105, Mr. Justice Brennan, in his concurring opinion, stated that "as in *Perez* v. *Brownell*, we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution." Since American citizens voting in foreign elections might reasonably be found to create frictions and embarrassments against

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*Section 352(a)(2) was sustained in *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860.

which Congress might regulate under the foreign affairs power, the Court held in *Perez* that there was a "rational nexus" existing between the means—expatriation—and the ends sought to be achieved. 356 U.S. at 57–58.

The Court further observed in *Perez* that, in determining whether a "relevant connection" existed, it was not irrational for Congress to interpret voting in a foreign election as (356 U.S. at 61):

> importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

On the basis of this language, appellant contends (Br. 61) that "*Perez* clearly means that Congress has a power to attach expatriation only to acts which are inconsistent with allegiance and through their political nature connote allegiance to a foreign country." Even if the language of the *Perez* case did lend itself to appellant's construction, the holding of that case is of no avail to her. Surely voting in a foreign election—a single act quickly done and easily forgotten—is more consistent with allegiance to the United States than prolonged residence in one's native country, abandoning virtually all ties to the country which she temporarily adopted.

Moreover, *Perez* does not support appellant's legal position that a transfer of allegiance is a condition of expatriation. It said, rather, that the fact that voting in foreign elections implies allegiance to another country "is not without significance." 356 U.S. at

60. Previously, however, the Court made clear that "[t]*he critical connection* between [voting in foreign elections] and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations" (emphasis added). *Ibid.* This is consistent with the basic rule, expressed in the *Mackenzie* and *Savorgnan* cases, that Congress may attach loss of citizenship to a voluntary act of a citizen, where the action bears a reasonable relationship to any of Congress' granted or implied powers. Thus, Congress has the power to expatriate not only pursuant to its powers relating to citizenship on the basis of a transfer of allegiance to another country, but also pursuant to its broad powers over foreign affairs.

To say that the citizen's act must be "voluntary" is not to say that the citizen must have a specific intent to expatriate himself. See *Perez* v. *Brownell, supra,* 356 U.S. at 61. Quite the contrary, the petitioner in the *Mackenzie* case "had not intended to give up her American citizenship" when she committed the expatriating act (*Savorgnan* v. *United States, supra,* 338 U.S. at 501); and the petitioner in the *Savorgnan* case "had no intention of endangering her American citizenship or of renouncing her allegiance to the United States" (*id.* at 495). Thus, it is irrelevant that appellant did not intend to renounce her American citizenship by residing in Germany for three years. Her desire both to live in her native

country and to retain her American citizenship is not different from the desire of the petitioner in *Savorgnan* to be a citizen of Italy as well as a citizen of the United States. The question in both cases is whether Congress can expatriate those who engage voluntarily in specified conduct. There is no question that appellant engaged in conduct—protracted residence in the country of her former nationality—to which Congress has attached expatriation as a consequence, and there is no question that she intended to engage in that conduct.

Accordingly, the basic issue in this case is whether there is a rational nexus between one or more of Congress' granted or implied powers and loss of citizenship. We will show that Congress was acting under its broad powers to regulate foreign relations and citizenship and that there is a rational connection between the exercise of these powers and expatriation.[1] We will then show that the decision of Congress to confine the statute to naturalized citizens residing in their former homelands was directly related to the problems confronting it and therefore was a reasonable classification consistent with the due process clause.

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[1] The two powers may, of course, be considered together as well as separately. This Court has stated (*Legal Tender Cases*, 12 Wall. 457, 534): "[T]he existence of any power claimed for the Federal government * * * may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred."

I

SECTION 352(a)(1) IS A REASONABLE EXERCISE OF CONGRESSIONAL POWER TO LEGISLATE CONCERNING CITIZENSHIP IN A MANNER WHICH WILL AVOID A SERIOUS SOURCE OF INTERNATIONAL DISPUTE

A. SECTION 352(a)(1) IS THE CONSIDERED PRODUCT OF YEARS OF EXPERIENCE IN DEALING WITH THE PROBLEMS ATTENDANT UPON THE RETURN OF NATURALIZED CITIZENS TO THEIR HOMELANDS

Expatriating naturalized citizens who return to their native lands to reside is not a recent innovation. Since the practice has a long history, it can only be properly evaluated after an examination of the relevant historical materials.

1. The Constitutional and Early Background

At the time the Constitution was adopted,[8] the United States had inherited from England the concept of citizenship. Lord Coke, in his landmark opinion in *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608), formulated two principles: (1) that rights conferred by naturalization or endenization were subject to the conditions and limitations reserved in the instrument granting those rights,[8] for, to use Coke's

[8] At common law a person born outside the realm could acquire citizenship either by naturalization (which required a special act of parliament, similar to a private law today), or by endenization (which consisted of a grant from the king). Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 38–40 (1957); Cockburn, *Nationality* 27–28 (1869); *Calvin's Case*, *supra*, 7 Co. Rep. at 5b–6a, 77 Eng. Rep. at 383–384. Prior to *Calvin's Case* the legal status of a naturalized or endenized person was quite uncertain. Parry, *supra*, pp. 39–40. Except for an unsuccessful and short-lived attempt in 1708, England did not have a general naturalization statute until 1844. *Id.* at 65–66.

maxim, *"cujus est dare, ejus est disponere"* (he who gives anything can direct how the gift is to be used); and (2) that no citizen could renounce his citizenship without the consent of the Crown. See also 1 Blackstone, *Commentaries* 368–369 (Tucker ed., 1803). The first of these principles was made effective in England by imposing specific conditions in all grants of naturalization. See Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 57–71 (1957); Cockburn, *Nationality* 29–32 (1869). From 1700 to 1844, all instruments conferring citizenship contained a clause disabling naturalized citizens from holding public office or from taking grants from the Crown. *Ibid.* Under a statute enacted in 1744, naturalized citizens who had not resided in England for seven years could not claim treaty rights available to other citizens doing business abroad. Parry, *supra*, p. 68. The second of these concepts was not reciprocal between the citizen and the Crown. The Crown could and did under various statutes expatriate citizens over their protests even when no specific condition was attached to the grant of naturalization. Foreign residence was one such ground for expatriation. In the seventeenth century, it was believed that residence abroad without the consent of the government constituted a breach of allegiance, and a 1719 statute expatriated "artificers and manufacturers" who resided abroad in disobedience to an order to return. Parry, *supra*, pp. 47–48, 66.

The idea that naturalization includes some limitations is reflected in the American Constitution. Under Article II, Sec. 1, a naturalized citizen may not

become President; under Article I, Sec. 2, he must wait at least seven years after he obtains his citizenship before he is eligible to sit in the House of Representatives; and under Article I, Section 3, at least nine years before he can sit in the Senate. While Madison and Hamilton opposed writing such conditions into the Constitution, one of their reasons was, in Madison's words, that it was unnecessary "because the Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship." 2 Farrand, *The Records of the Federal Convention of 1787*, 235 (1911); see *id.* at 268 (Hamilton's view); see, generally, *id.* at 235–239, 268–272. Thus, it was recognized by the framers of the Constitution that at least some of the benefits of naturalization might depend on maintaining an American domicile.

During debate on the first naturalization bill in the First Congress, where the question at issue was whether a residence requirement should be established for naturalization, Alexander White of Virginia suggested that, if the residence requirement were stricken, "another clause ought to be added, depriving [naturalized] persons of the privilege of citizenship, who left the country and staid abroad for a given length of time." 1 Annals of Cong. 1110 (1790). John Lawrence of New York then rose and suggested that the three conditions on naturalization written into the text of the Constitution might be exclusive and questioned whether Congress had the power to impose additional

conditions. *Id.* at 1111. The next speaker, James Madison, responded (*id.* at 1112):

> It may be a question of some nicety, how far we can make our law to admit an alien to the right of citizenship, step by step; but there is no doubt we may, and ought to require residence as an essential.

Four other members of the House (Smith, Hartley, Tucker, and Stone) rose in support of Madison's view that Congress had the power to enact "step-by-step" or "progressive" naturalization—that is, to withhold various rights of citizenship, such as voting and serving in legislatures, until the person had been resident for a certain term of years subsequent to naturalization—pointing out that this merely reflected the practice prevalent in the States at that time. *Id.* at 1112–1118. The propriety of step-by-step naturalization was not further questioned.[9] There is no suggestion that White's proposal was thought by any Congressman to violate the Constitution.

The Constitution does not specifically deal with loss of United States nationality by either native-born or naturalized citizens. However, questions promptly arose in connection with the rights of those who chose residence in the United States to be deemed free of

[9] Eighteen years later, in 1808, a bill was reported out of committee, but not debated in the House of Representatives, which would have expatriated all citizens residing abroad. 18 Annals of Cong. 1871 (1808); Tsiang, *The Question of Expatriation in America Prior to 1907*, 56 (1942).

any allegiance to the country of their origin. This became a political issue between the Hamiltonians, who urged adherence to the common-law principle of perpetual allegiance, and the Jeffersonians, who contended that all men had a natural right to renounce citizenship.[10] See Tsiang, *The Question of Expatriation in America Prior to 1907*, 25–28 (1942); Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 26 Am. J. Int'l L. 552, 552–555 (1932). The Jeffersonian defense of the right to renounce citizenship was that emigration, and resulting foreign residence, dissolved the ties binding a citizen to his government, thereby rendering him free to expatriate himself. See Letter from Secretary of State Jefferson to Morris (1793), 1 *American State Papers: Foreign Rel.* 169 (Lowrie ed., 1832). The question of the right to renounce citizenship acquired at birth was, of course, a serious one during the War of 1812. Indeed, in 1814, the administration prepared for the impending peace negotiations by circulating an anonymous pamphlet, *A Treatise on Expatriation* (1814), which went so far as to declare that emigration with an intent to reside abroad permanently *ipso facto* con-

[10] The controversy remained political, for although some lower courts expressed opinions on both sides, the Supreme Court refused to decide the question. See, *e.g.*, *Murray* v. *The Schooner Charming Betsy*, 2 Cranch 64, 120; *Talbot* v. *Jansen*, 3 Dall. 133, affirming *sub nom. Jansen* v. *The Vrow Christina Magdalena*, 13 Fed. Cas. 356 (No. 7,216) (D. S.C.); *Williams' Case*, 29 Fed. Cas. 1330 (No. 17,708) (C.C.D. Conn.).

stituted expatriation without the necessity of formally acquiring another nationality."[11]

The importance which was attached to residence during this early period is also reflected in judicial decisions. In *The Dos Hermanos*, 2 Wheat. 76, a prize case decided in 1817, Justice Story, ruling that the claimant was not entitled to relief because he was an American citizen, reasoned that the claimant was born an American citizen and that, even if he had been naturalized abroad, he reacquired American citizenship on returning to this country and establishing domicile. *Id.* at 98. On the other hand, in *Chacon* v. *Eighty-Nine Bales of Cochineal*, 5 Fed. Cas. 390, 393 (No. 2,568) (C.C.D. Va.), affirmed on other grounds *sub nom. The Santissima Trinidad*, 7 Wheat. 283, the court (Chief Justice Marshall) said in *dictum* that American citizenship, once lost, can only be reacquired by naturalization. In *Alsberry* v. *Hawkins*, 39 Ky. 177, the court held that, in the absence of evidence to the contrary, it would be inferred that a person domiciled in a foreign country had acquired

[11] The administration commissioned George Hay, who was United States Attorney for Virginia and Secretary of State Monroe's son-in-law, to write the pamphlet. It was printed in the government printing office, and circulated and franked by Monroe. Tsiang, *supra*, p. 53; Morrow, *supra*, p. 561; Lowell, *Review of A Treatise on Expatriation by George Hay, Esquire* 3–4 (1814). The thesis, as expressed in Hay's own words, was (*A Treatise on Expatriation*, *supra*, p. 21): "Expatriation, I must repeat, is nothing more than emigration with an intention to settle permanently abroad." The Lowell work was a Federalist response exposing the Administration's participation in the preparation of Hay's circular and attacking its historical validity.

the citizenship of that country and had abandoned American citizenship.

2. Nineteenth Century Problems in Foreign Relations Arising From the Return of Naturalized Citizens to their Former Countries

In the nineteenth century, citizenship problems of a different kind became manifest. Naturalized citizens residing for extended periods in their native countries became sources of embarrassment and conflict in the conduct of America's foreign relations. Many nations did not recognize foreign naturalizations, and would, when their former nationals returned, draft them into military service, charge them with political crimes,[12] refuse to allow them to leave the country, or make other demands based upon the former ties of allegiance. When so treated, the naturalized citizen would often petition the United States for assistance or diplomatic protection. American representations on behalf of naturalized citizens

[12] Prosecution for political crimes arose because naturalized citizens were often politically hostile to the governments of their former countries. Two significant factors in the rise of American immigration in the nineteenth century were the potato famine in Ireland—which left bitter feelings in Ireland against the British government—and the collapse of democratic movements in Prussia and Austria when reaction set in after the Revolutions of 1848. See 1 Morison and Commager, *The Growth of the American Republic* 503 (5th ed., 1962); Handlin, *Immigration as a Factor in American History* 20–31 (1959). Thus, Prussia was particularly hostile to her former nationals who returned after being naturalized in the United States, for Prussia believed that they returned as agents of the "German democratic propaganda" and "flaunted their Americanism in the face of the authorities." 2 *Foreign Rel. U.S.* 1294 (1873).

residing in their country of origin were often flatly rebuffed. For when a particular state refused to recognize an American's naturalization, it would generally refuse also to recognize this country's right to protect such a person.[13] The result, in many cases, was either embarrassment of the United States or controversy with the foreign government. See, *e.g.*, 3 Moore, *Digest of International Law* 562–715, 735–757, 766–771 (1906); 2 Wharton, *Digest of International Law of the United States* 360–393 (2d ed., 1887); 2 *Foreign Rel. U.S.* 1293–1325 (1873).

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[13] Prussia, for example, was obdurate in refusing to recognize American protests on behalf of naturalized citizens. See, *e.g.*, 2 *Foreign Rel. U.S.* 1293–1298 (1873); S. Exec. Doc. No. 38, 36th Cong., 1st Sess.

The friction in various countries was often quite serious. Between 1831 and 1912, protection of American citizens, both native-born and naturalized, resulted in the following: the United States made a show of naval force in the Near East after American citizens had been massacred in 1858, and took similar action near Haiti in 1888 to protect the rights of citizens residing there; American ships enforced citizens' rights by firing on Japanese and Brazilian naval vessels in 1863 and in 1893; trade rights for American residents abroad were acquired and enforced by landing troops twice in Japan in 1853 and 1864; and in order to protect, or retaliate for past injuries to, the property and lives of American citizens and government personnel, this country landed troops once on Argentine soil (1831), once in Chile (1891), three times in China (1854, 1859, and 1900), once in the Dominican Republic (1903), once in Egypt (1882), twice in Honduras (1907 and 1910), once in Japan (1868), three times in Korea (1871, 1888, and 1894), once in Mexico (1876), three times in Nicaragua (1854, 1894, and 1910), once in Panama (1860), and three times in Uruguay (1855, 1858, and 1868). U.S. Solicitor for the Department of State, *Right to Protect Citizens in Foreign Countries by Landing Forces* 51–78 (1929).

Despite the difficulties involved, it has traditionally been this country's foreign policy to extend diplomatic protection to all citizens, both native-born and naturalized. See, *e.g.*, Letter from Secretary of State Madison to Monroe (1804), 3 *American State Papers, supra*, pp. 85–86; *Morrow, supra*, p. 561. Refusal to grant protection and other services was considered degrading to the dignity of a nation committed to the defense of the rights of its citizens. See, *e.g.*, Letter from Secretary of State Seward to Wright (1865), 3 *Foreign Rel. U.S.* 68–69 (1865); Letter from Secretary of State Marcy to Daniel (1855), 3 Moore, *supra*, pp. 569–570. Nonetheless, the Department of State early settled on the policy of withdrawing diplomatic protection from naturalized citizens domiciled in their native states. *E.g.*, Letter from Secretary of State Adams to Shaler (1818), 3 Moore, *supra*, pp. 735–736; Letter from Minister to Prussia Wheaton to Knocke (1840), S. Exec. Doc. No. 38, 36th Cong., 1st Sess. 6; Letters from Secretary of State Fish to Wing (1870–1871), 2 Wharton, *supra*, pp. 361–362; Circular issued by Secretary of State Hay to American diplomats (1889), 3 Moore, *supra*, p. 950. This policy was no doubt influenced by the tradition that naturalization is subject to conditions and by Jeffersonian thought on the relationship between foreign residence and citizenship. In any event the Department pro-

tected all citizens abroad, except for naturalized citizens residing in their countries of origin."[14]

Shortly after the Civil War, the problem of naturalized citizens residing in their native countries became quite critical: in Prussia large numbers of naturalized American citizens were being conscripted into the army and in Great Britain—where the doctrine of perpetual allegiance was followed—many naturalized citizens who had returned to Ireland were arrested and charged with complicity in the Fenian revolt. See, *e.g.*, Cong. Globe, 40th Cong., 2d Sess. 831–832, 969, 1015–1018, 1098–1099, 1105–1106, 4212 (1868).

In 1868 Congress responded to these events by enacting "An Act concerning the Rights of American Citizens in foreign States,"[15] Rev. Stat. §§ 1999–2001

[14] Although the general practice was to deny protection to naturalized citizens in the countries of their origin, some Secretaries of State followed a different policy. For instance, when James Buchanan was Secretary of State and President, the Department pressed protection claims vigorously on behalf of naturalized citizens who had returned to their native countries. See, *e.g.*, 2 *Foreign Rel. U.S.* 1301 (1873); 3 Moore, *supra*, pp. 566–567.

Occasionally, native-born citizens were also denied protection, but they had to commit other acts in addition to being domiciled abroad. *E.g.*, 14 Op. Att'y Gen. 295, 298–299; Letter from Secretary of State Fish to Grant (1873), 2 *Foreign Rel. U.S.* 1191 (1873); see also Tsiang, *supra*, p. 107.

[15] "Sec. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that

(1875), which declared that "the right of expatriation is a natural and inherent right of all people," and that naturalized citizens traveling abroad should be extended the same diplomatic protection as native-born

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such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

"Sec. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of person and property which is accorded to native-born citizens.

"Sec. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

Due to an oversight, the 1868 statute was omitted from the 1958 edition of the United States Code. However, it is still in force and is considered by the Department of State to be determinative of its policies.

citizens."[15] The purpose of the Act was to induce other countries to abandon their claims against persons naturalized in the United States. Cong. Globe, *supra*, p. 2312.

When the 1868 Act was reported out of the House Committee on Foreign Affairs, it explicitly provided that protection would not be accorded to certain classes of citizens, including citizens (both native-born and naturalized) who had resided abroad continuously for five years, citizens who had not paid taxes to the United States, citizens who served in foreign armies, and naturalized citizens who returned to their native countries with the intent to reacquire a domicile there. Cong. Globe, 40th Cong., 2d Sess. 783, 831. Domicile was defined as five years' continuous residence or becoming established in a business which manifested an intent to resume permanent residence. *Ibid.* In addition, Representative Jencks of Rhode Island offered a substitute bill which would have expatriated any citizen who became naturalized in a foreign State, who performed public duties under a foreign government, or who became domiciled abroad without an intent to return to the United States. *Id.* at 968, 1128–1129. The proposed excep-

[15] Although recent events in Prussia and Great Britain appeared to be the immediate cause of the Congressional action, Congress was well aware that the problem was not confined to those two countries. For example, Representative Chanler of New York observed on the floor of the House (Cong. Globe, *supra*, p. 1015):

"The evil which this bill is called on to redress seems almost universal in Europe. No American is safe if a public official chooses to show his zeal to his Government by arresting Americans to discourage emigration."

tions to the declaration that all citizens would be granted diplomatic protection were subjected to extensive criticism on the floor of the House. The critics contended that they weakened an otherwise strong protest against Great Britain and that, in any event, the exceptions were unnecessary because the Department of State never had protected, and never would protect, such persons. See, *e.g.*, *id.* at 965–970, 986–987, 1015–1016, 1106. As a result, the Committee on Foreign Affairs withdrew the bill, and later reported out a new bill which was substantially similar to the Act which Congress finally passed. *Id.* at 1160, 1797.

During the same year, 1868, the Department of State attempted a second approach to the problem. Mr. Bancroft, the American Minister to the North German Confederation, negotiated a treaty with that state which provided, first, that each country would recognize naturalization of its natives by the other country; second, that "[i]f a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization * * *"; and third, that "[t]he intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." 15 Stat. 615, 616–617. Similar treaties, known as the "Bancroft treaties," were concluded with several other countries from then until well into the twentieth century. *E.g.*, 17 Stat. 941 (Denmark); 37 Stat. 1653 (Convention with several Latin American countries). Today 21 such treaties are still in force. However,

many countries, including a number of large and important ones, have refused to enter such treaties. See, *e.g.*, 3 Moore, *supra*, pp. 604–607 (Greece), 609 (Italy), 622 (Russia).

Late in the nineteenth century, in dealing with countries with which no naturalization treaty had been entered, the Department of State went beyond the mere denial of protection. It became the practice to inform naturalized citizens residing in their native lands without intent to return that they had expatriated themselves. *E.g.*, Letter from Acting Secretary of State Hill to Pioda (1901), *Foreign Rel. U.S.* 511 (1901); Letter from Assistant Secretary of State Rives to Proios (1888), 3 Moore, *supra*, pp. 741–742; Letter from Secretary of State Bayard to Lee (1886), *id.* at 740–741; Letter from Examiner of Claims Smith to Hance (1867), *id.* at 737; Letter from Secretary of State Seward to Marsh (1863), *id.* at 736; see also 7 *Messages & Papers of the Presidents* 240 (Richardson ed., 1897) (President Grant's annual message to Congress in 1873); 2 *Foreign Rel. U.S.* 1185–1223 (1873) (opinions of the cabinet officers). This doctrine—that domicile by a naturalized citizen in the country of his former nationality resulted in his expatriation—was followed on several occasions by international mixed claims commission set up to arbitrate the claims of American citizens against foreign governments. See 3 Moore, *History and Digest of International Arbitrations* 2562–2572, 2579–2581 (1898). However, the Department's practice was not uniform as to whether such persons were expatriated or were merely denied protection; it apparently de-

pended on the particular Secretary of State as well as the officer making the determination. See, *e.g.*, 2 *Foreign Rel. U.S.* 1186–1232 (1873).

While "[n]o one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection," *Perez* v. *Brownell*, 356 U.S. 44, 49, it was widely regarded as unsatisfactory that such determinations should depend upon scattered treaties and ungoverned executive discretion. See H. Doc. No. 326, 59th Cong., 2d Sess. 13, 26. There were proposals that Congress should enact a statute providing for expatriation of naturalized citizens who returned to their former homelands for a specified number of years. As early as 1863, President Lincoln, troubled by the "altercations and great prejudices" that had resulted from the return of naturalized citizens to their countries of origin during the Civil War, suggested to Congress that "[i]t might be advisable to fix a limit beyond which no citizen of the United States residing abroad may claim the interposition of the government." 6 *Messages & Papers of the Presidents* 181 (Richardson ed., 1897).

In 1873, President Grant requested his principal executive officers to respond in writing to eight questions on expatriation and the protection of American citizens abroad. 2 *Foreign Rel. U.S.* 1185–1186 (1873). The third question was, "Can an election of expatriation be shown or presumed by an acquisition of domicile in another country, with an avowed pur-

pose not to return?" The sixth question, directed to naturalized citizens, asked whether they could be deemed to have expatriated themselves by returning to their native countries and residing there for a series of years with no apparent purpose of returning. Secretary of State Hamilton Fish wrote in answer to the third question (*id.* at 1188–1189):

> He may reside abroad for purposes of health, of education, of amusement, of business, for an indefinite period; he may acquire a commercial or a civil domicile there; but if he do so sincerely and *bona fide animo revertendi,* and do nothing inconsistent with his preexisting allegiance, he will not thereby have taken any step towards self-expatriation.
>
> But if, instead of this, he permanently withdraws himself and his property, and places both where neither can be made to contribute to the national necessities, acquires a political domicile in a foreign country, and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation.
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> * * * * *
>
> But in the absence of legislative definition of what constitutes "expatriation," and of the mode whereby it is to be effected, the experience of the Government has made manifest that while expatriation is declared to be a right, which may be converted into a fact, it is, like other facts, to be established in each individual case by evidence peculiar to itself; and each case to be decided upon its own merits.

Mr. Fish applied the same standards to naturalized citizens residing abroad as he had applied to native-

born citizens, but he made an exception for naturalized citizens residing in their native countries because (*id.* at 1190–1191):

> [T]here is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him at a period, perhaps, when the restlessness and spirit of adventure of the fresher years of life have passed, to rest and to end his days amid the scenes of his childhood or youth and among those who claim the strong ties of common blood.
>
> Hence, probably, even when not regulated by treaty, the evidence would be more readily obtained to determine that a naturalized citizen who had returned to the country of his nativity should be deemed to have expatriated himself—or, perhaps it would be more proper to say, to have rehabilitated himself with his original citizenship—than to show that a native-born citizen had expatriated himself by the same period of foreign residence.

The other executive officers expressed differing opinions: three answered that neither naturalized nor native-born citizens should be expatriated in such circumstances; two would have expatriated both classes of citizens; and the remaining officer thought naturalized, but not native-born, citizens should be deemed to have expatriated themselves. *Id.* at 1193–1223.

The answers were submitted by President Grant with his annual message to Congress of 1873 in which

he requested that legislation be enacted to guide the executive department in these matters. 7 *Messages & Papers, supra*, pp. 239–240. In his annual message of 1874, President Grant said (*id.* at 291–292).

> Notwithstanding such assertion and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least a great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims of citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere.

Congress did not respond, and no legislation was enacted in the nineteenth century.

3. Expatriation Legislation in the Twentieth Century

Congress took a small step in the direction of solving the problem of naturalized citizens returning to their former homeland in the Naturalization Act of

1906, 34 Stat. 596, 601. That statute provided that the naturalization of a person who establishes permanent residence in a foreign country within five years of his naturalization shall be presumed fraudulent and subject to revocation.[17] While the 1906 act was under consideration, Congress called for a thorough examination of American citizenship, expatriation, and diplomatic protection. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 49–50. Accordingly, Secretary of State Elihu Root appointed several high officials to a "citizenship board" to consider and report on these matters.[18] See H. Doc. No. 326, *supra*, pp. 1–2.

An extensive report was submitted by the board in 1906. H. Doc. No. 326, *supra*. It stated (*id.* at 25):

> Expressed renunciation of American citizenship is, however, extremely rare; but the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger each year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.

The board concluded that the problem could not be solved by merely denying diplomatic protection, for a denial of protection is, at best, of a transitory character which results in the unseemly spectacle of "one

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[17] This provision is now contained in Section 340(d) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. 1451(d). Its constitutionality was sustained in *Luria* v. *United States*, 231 U.S. 9.

[18] The board consisted of the Solicitor of the State Department, the Minister to the Netherlands, and the Chief of the Passport Bureau.

official [granting] what another has refused." Moreover, a mere denial of protection leaves too much uncertainty with respect to the status of a citizen. *Id.* at 26. The board recommended, *inter alia*, that legislation be enacted to provide that citizens "may be assumed" to have expatriated themselves (1) by being naturalized in a foreign state, (2) by entering the service of a foreign government when such service required taking an oath of allegiance, or (3) by becoming domiciled in a foreign state. *Id.* at 23. In connection with the last item, the board proposed a rebuttable presumption that domicile had been acquired upon five years' residence without an intention to return to the United States."

The board's recommendations led to the enactment of the Nationality Act of 1907, 34 Stat. 1228. Section 2 of that Act expatriated citizens who became naturalized in, or took an oath of allegiance to, a foreign state. It further provided (*ibid.*):

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the

[11] The board also recommended that efforts be renewed to negotiate naturalization treaties. H. Doc. No. 326, *supra*, pp. 13–14 (see pp. 27–28 above).

> Department of State may prescribe: *And provided also;* That no American citizen shall be allowed to expatriate himself when this country is at war.

In explaining the purpose of the latter provision, the House committee stated (H. Rep. No. 6431, 59th Cong., 2d Sess. 2):

> Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. * * * Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. * * *
>
> * * * [S]uch a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

The State Department issued detailed instructions which provided that the presumption of loss of citizenship might be rebutted by the presentation of satisfactory evidence that the individual intended eventually to return to the United States to reside permanently and that his residence abroad (1) was as a representative of American trade or commerce, (2) was for reasons of health or education, or (3) resulted from unforeseen exigencies preventing his return. Instructions of April 19, 1907, 1 *Foreign Rel. U.S.* 4 (1907). The instructions were later broadened to cover other circumstances (see *Nationality*

Laws of the United States, Part 1, House Committee Print, 76th Cong., 1st Sess. 69–70 (1939)), and formed the basis of the many exceptions to the provision involved in the instant case (see pp. 3–5 above)."

The presumption written into the 1907 Act proved troublesome in practice. Attorney General Sargent described it in 1928 as "so loosely drawn that its operation and effect have been in doubt since its passage," and urged the need for "clarifying legislation." 35 Op. Att'y Gen. 399, 404.[20] In 1933, President Roosevelt appointed a committee consisting of the Secretary of State, the Attorney General, and the Secretary of Labor to review the nationality laws. After five years of intensive study by experts,[21] the committee concluded that (*Nationality Laws, supra*, p. 70), while the presumption:

> has been of much practical use * * *, it has been found to a considerable extent to be insufficient and unsatisfactory, since, as con-

[20] Appellant asserts (Br. 30, 53) that the 1907 Act applied the presumption only to loss of diplomatic protection, not to loss of citizenship itself. While the wording of the statute is in terms of loss of citizenship and not merely protection, an Attorney General's opinion and several judicial decisions support appellant's statement. 28 Op. Att'y Gen. 504; *e.g.*, *Camardo* v. *Tillinghast*, 29 F. 2d 527 (C.A. 1). *Contra*, *United States ex rel. Anderson* v. *Howe*, 231 Fed. 546 (S.D. N.Y.).

[21] The Attorney General cited this Court's opinion in *Talbot* v. *Jansen*, 3 Dall. 133, 154, which stated that a statute "relative to expatriation, is much wanted" and besides "ascertaining by positive law the manner in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point."

[22] The experts included among others, Charles E. Wyzanski, Green H. Hackworth, and Richard W. Flournoy.

> strued by the courts, the presumption of loss of citizenship arising under its terms never becomes final, regardless of the length and cause of the foreign residence.

Moreover, the committee observed, the courts had construed the presumption as relating "to loss of the right to diplomatic protection as a citizen, rather than loss of citizenship itself," thus frustrating the purposes of the 1907 legislation. The cabinet committee went on to state that (*ibid.*):

> [B]efore an alien is admitted to the privilege of citizenship, under the law of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted.
>
> The problem presented by naturalized citizens of the United States residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals, of whom there are thousands at the present day, has been a cause of difficulty and embarrassment to the Government of the United States in its efforts to extend protection to other naturalized citizens in meritorious cases.

It was also pointed out that (*id.* at 71):

> Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes

> it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated. Naturally, in these cases, identification with the native population is much more likely to occur than in the cases of naturalized citizens who reside in foreign countries other than those from which they came.

Accordingly, the cabinet committee recommended the enactment of a provision that a naturalized citizen (unless he came within specified exceptions) should lose his citizenship by "[r]esiding continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated." *Nationality Laws, supra,* pp. 69, 76.[23] In its letter transmitting its report to the President, the committee stated (*Nationality Laws, supra,* p. vii):

> Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality to their foreign-born children having little or no connection

[23] The committee also recommended an additional provision for the expatriation of a naturalized citizen who resides for two years in his country of origin if he thereby requires its nationality by operation of law. *Nationality Laws, supra,* p. 69.

The committee expressed the hope that enactment of the three-year provision might induce more countries to enter into naturalization treaties with the United States. *Id.* at 71.

> with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside.

In explaining why expatriation rather than denial of protection was recommended, the committee said, "In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable." *Ibid.* The committee also stated (*ibid.*):

> None of the various provisions in the [draft] Code concerning loss of American nationality, such as those applicable to * * * persons who, after obtaining American nationality through naturalization, establish a residence abroad, is designed to be punitive or interfere with freedom of action.

The President transmitted the report and draft statute to Congress in June 1938.[24]

Extensive hearings were held on the proposed statute by the House Committee on Immigration and Naturalization. Mr. Flournoy, Assistant Legal Advisor of the State Department, testified that the provision for expatriation of naturalized citizens who reside for three years in their native countries "is the most important proposed change in the whole code." *Hearings before the House Committee on Im-*

[24] At the time of the report the committee was composed of Secretary of State Hull, Attorney General Cummings, and Secretary of Labor Perkins.

migration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 134. He said that (*id.* at 134):

> We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who had been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such person should lose not only his right to protection but his citizenship itself.

He explained why mere denial of protection was an insufficient remedy (*id.* at 134–135):

> We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship.

The Nationality Act of 1940, as passed by Congress, incorporated the provision for expatriating naturalized citizens who reside in their countries of origin for three years, exactly as it had been proposed by the cabinet committee. Section 404(b), 54 Stat. 1170. In addition, Congress added a provision that a naturalized citizen "[r]esiding continuously for five years

in any other foreign state" should lose his citizenship. Section 404(c), 54 Stat. 1170.[25]

A Congressional investigation of the immigration and nationality laws instituted some seven years later in 1947 concluded that the "continuous residence" requirement in Section 404(b) and (c) allowed evasion since persons subject to those provisions "break the continuity of their foreign residence by short trips to another foreign country, or by a short visit to the United States." S. Rep. No. 1515, 81st Cong., 2d Sess. 767. The investigating subcommittee also recommended that several additional groups of individuals be added to those excepted from the operations of Section 404. *Id.* at 767–768.[26] These recommendations were adopted in the Immigration and Nationality Act of 1952, which carried over the three-year provision unchanged as Section 352(a)(1) and the five-year provision as Section 352(a)(2). 66 Stat. 269,

[25] These provisions in fact did not go into effect until 1946 because they were suspended during World War II. 59 Stat. 544.

Congress also adopted in the 1940 Act a provision for the expatriation of naturalized citizens who resided for two years in their country of origin if they thereby became citizens of that country. Section 404(a), 54 Stat. 1170.

[26] The committee further recommended the repeal of the provision in Section 404(a) for the expatriation of a naturalized citizen who resided in their country of origin for two years if they thereby became citizens of that country. S. Rep. No. 1515, *supra*, p. 767. This recommendation was followed by Congress.

8 U.S.C. 1484(a)(1), (a)(2). Congress adopted a specific definition of "continuous residence" to mean "actual dwelling place" without requiring an "uninterrupted physical presence in a foreign state" (Section 101(a)(33), 66 Stat. 166, 8 U.S.C. 1101(a)(33); see p. 2 above) and enlarged the groups excepted from the operation of Section 352 (Section 353, 66 Stat. 270). The exemptions in Section 353 have been slightly amended since that time. 73 Stat. 274, 8 U.S.C. 1485(7); see pp. 3–5 above.

Although the 1952 Act was extensively analyzed and often criticized by persons of all political persuasions during lengthy Congressional hearings in 1951, we have found not a word of criticism against proposed Section 352(a)(1). See *Joint Hearings Before the Subcommittees of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. (1951). Among those who offered detailed criticisms of the proposed legislation were representatives of the Association of Immigration and Nationality Lawyers, the National Council on Naturalization and Citizenship, and the American Jewish Congress, who found Section 352(a)(2) discriminatory and unreasonable but made no objection to 352(a)(1). *Id.* at 86, 105, 386–389, 393–394, 683.[17] The American Civil Liberties Union found the bill deficient in many respects but made no mention of 352(a). *Id.* at 126. And Americans for Democratic

[17] The recommendations of the National Council on Naturalization and Citizenship were adopted by the National Catholic Rural Life Conference and the National Council of Jewish Women. *Joint Hearings*, *supra*, pp. 237, 542.

Action contrasted the injustice of expatriating a naturalized citizen for residing in any foreign country (Section 352(a)(2)) with the expatriation of those who return to reside in their native countries. *Id.* at 442.[28]

4. The Problem Today

Since, by virtue of the 1940 Act and its successors, naturalized citizens residing abroad for considerable periods of time have been deemed expatriated, it is difficult to measure the extent of the international difficulties which would be created if a different approach were to prevail. However, incidents involving American naturalized citizens returning for visits do suggest that residence of United States nationals abroad continues to be a source of international friction which might well be greatly aggravated if the group were expanded to include those now deemed expatriated. The number of naturalized citizens residing in their native countries is substantial. In 1962 the Department of State found that 699 persons were expatriated under Section 352(a)(1), 128 persons under Sections 404 (a) and (b) of the Nationality Act of 1940, and 94 persons under Bancroft treaties—a total of 919 expatriations on the basis of residence in countries of former nationality in just one year. Thus, thousands of former naturalized American citizens are

[28] Mrs. Ruth B. Shipley, Chief of the Passport Division of the State Department, objected to Section 352(a)(2) but suggested approval of Section 352(a)(1). *Joint Hearings, supra*, pp. 247–248. Another witness, B. Meredith Langstaff also criticized Section 352(a)(2) but approved Section 352(a)(1). *Id.* at 598.

living abroad who have been expatriated under the same or similar provisions as those involved here. An estimated 5,000 claimants to American citizenship reside in "iron curtain" countries alone; most of them have been deemed expatriated by reason of voluntary foreign residence. *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. Res. 49,* 85th Cong., 1st Sess. 133.

A recent example of the problems arising when naturalized citizens reside for a considerable period of time in the country of their origin is provided by Polish-American relations. In 1947, claims to United States citizenship by persons residing in Poland had caused such concern that the two countries set up a mixed nationality commission to investigate the matter. U.S. Department of State Press Release No. 413, May 25, 1948. It was contemplated that the establishment of such a commission would induce Poland to grant requests by *bona fide* citizens to leave for the United States and to permit American representatives to visit claimants who had been arrested. The commission proved a failure, and Poland continued to forbid American citizens to depart and to bar visits to claimants in prison. This item of history shows that the problems in international relations arising from residence of United States nationals abroad, particularly those residing in a country which has some claim upon them under its own laws, cannot be adequately dealt with by the easy suggestion that such people should merely be denied protection. For one thing, the United States

must allow any citizen to enter this country. It would seem to be almost inevitable that, if those long resident in a foreign country which has a claim upon them seek to exercise their right to enter the United States, friction between the countries will ensue.

The State Department advises us that protection of naturalized citizens is today a sensitive matter in a number of countries—particularly Belgium, Greece, France, Iran, Israel, Switzerland, and Turkey—which refuse to recognize the expatriation of their nationals who acquire American citizenship. Greece, for instance, has since 1952 drafted her former nationals who return to visit. In 1963, during the middle of tourist season, the Greek government stopped several hundred naturalized American citizens of Greek origin at the border when they attempted to leave and charged them with draft evasion. Some were arrested as draft evaders, but the normal course was to make them pay a military tax which was assessed on the basis of personal income and which generally amounted to several hundred dollars. As a result of American intervention, Greek law was applied only to persons who left Greece after the age of eleven and who had not served in the United States Army. Later, exemptions were obtained for those who were "well established" in the United States. In September 1963, the law was abolished. See New York Times: Aug. 11, 1963, p. 13; Aug. 13, 1963, p. 2; Aug. 18, 1963, p. 6; Aug. 25, 1963, p. 10; Sept. 7, 1963, p. 4; Sept. 18, 1963, p. 5.

Several naturalized Americans who visited the World's Fair at Brussels were drafted into the Bel-

gian army. Switzerland has been imposing a military tax on her returning nationals. Typically, United States representations have been successful in instances when the naturalized citizen was merely visiting his former country; generally it has been unsuccessful in cases where the citizen remained for a substantial period and took up residence abroad.

Another indication of the Department of State's present concern over these problems is that Bancroft treaties (see pp. 27–28 above) with 21 countries are now in force and being applied.[29] Furthermore, the Department of State is currently drafting additional nationality treaties which it plans to offer to other countries in the near future. The United States also has treaties with several countries, including eleven countries with which we do not have Bancroft treaties, which deal with the military obligations of persons whose allegiance is claimed by more than one country.[30]

5. Similar Provisions In Other Countries

The history of expatriation because of prolonged residence abroad is essentially the same in other western countries. For example, during the nineteenth

[29] Albania, Argentina, Belgium, Bulgaria, Chile, Colombia, Costa Rica, Czechoslovakia, Denmark, Ecuador, El Salvador, Haiti, Honduras, Lithuania, Nicaragua, Norway, Panama, Peru, Portugal, Sweden, and Uruguay.

[30] Australia, Austria, Belgium, Brazil, Burma, Colombia, Chile, El Salvador, France, India, Indonesia, Netherlands, South Africa, Switzerland, and the United Kingdom. For the provisions of such treaties, see, *e.g.*, 50 Stat. 1317. The treaty with France was extended as recently as 1952. 3 *U.S. Treaties and Other International Agreements* 5345 (1952).

century, foreign residence or emigration was a basis for expatriation under the laws of France, Prussia, Austria, Bavaria, and Sardinia. See 2 *Foreign Rel. U.S.* 1276–1293 (1873). Under the laws of Great Britain, one finds that between 1850 and 1870 naturalized citizens who resided abroad for six months lost their citizenship, and between 1914 and 1948 naturalized citizens were expatriated if they resided abroad for seven years without maintaining a "substantial connection." Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 70, 171–172 (1957); Cockburn, *Nationality* 33–34 (1869).

Today, many other countries make residence abroad cause for expatriation under their nationality laws and generally these provisions apply, as in the United States, only to naturalized citizens. U.N. Secretariat, Legal Department, *Laws Concerning Nationality* (1954); *id.* (Supp. 1959). These compilations show that: (1) Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, New Zealand, Paraguay, Thailand, and Venezuela expatriate naturalized citizens who reside abroad for periods ranging from two to ten years; (2) Canada, Ceylon, Costa Rica, Israel, Nicaragua, and Pakistan expatriate naturalized citizens who reside abroad for periods from two to seven years if no substantial connection with their adopted country is maintained; (3) Liberia presumes expatriation from two years' residence in the country of former nationality; (4) Czechoslovakia and Poland expatriate any citizen who fails to obey an order to return home; (5) Australia, Cuba, Ghana, India, Malaysia, Netherlands, South Africa, Southern Rhodesia, Sudan, and

the United Kingdom expatriate naturalized citizens who have resided abroad for periods varying from three to seven years if they fail to file an annual declaration of intent to retain citizenship; (6) Afghanistan expatriates citizens residing abroad who display a lack of patriotic feelings and who intentionally avoid that country's consulates and legations; and (7) Yugoslavia expatriates any citizen who resides abroad for fifteen years, who does not perform civic duties, and who fails to report to specified government agencies.[21]

Only four of the thirty countries—Czechoslovakia, Poland, Afghanistan, and Yugoslavia—apply the provisions governing expatriation by reason of foreign residence to both native-born and naturalized citizens. The Pakistani law applies only to naturalized citizens; however, a different provision expatriates native-born citizens who reside abroad for seven years and who fail to file a declaration of intent to retain citizenship. The United Kingdom and seven Commonwealth countries apply their expatriation provisions to naturalized and registered citizens but not to native-born citizens. Citizenship by registration is an expedited form of naturalization available to near relatives of citizens and to nationals of other Commonwealth countries.

[21] New Zealand, Ghana, India, Malaysia, and the United Kingdom make an exception when continued citizenship is "conducive to the "public good" or "public welfare."

The *amicus curiae* brief of the American Civil Liberties Union, pp. 29–30, has different views as to the law of some of the countries discussed above. Based on the compilation prepared by the United Nations, we believe that the *amicus* brief is in error in this regard.

The reason for these distinctions between native-born and naturalized citizens was recently set forth by the delegate of the United Kingdom to an international Conference on the Elimination or Reduction of Future Statelessness:[22]

> The natural-born person had a birth right to his nationality: but the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour and States should have greater freedom to deprive him of his nationality.

On the basis of its consideration, the Conference adopted article 7 of the United Nations Convention on the Reduction of Statelessness, which provides that naturalized citizens who reside abroad for seven years shall be expatriated unless they make declarations of an intent to retain citizenship. See Weis, *The United Nations Convention on the Reduction of Statelessness, 1961,* 11 International and Comparative L.J. 1073, 1092 (1962); see, generally, *id.* at 1073–1096. Thus, the expatriation of naturalized citizens who adopt prolonged residence abroad has long been, and still is, the general practice of nations throughout the world.

* * * * * * *

In short, the whole history of this country—and of others as well—shows that the long-time residence of citizens abroad raises problems in international relations. Those problems are more acute when a natu-

[22] Summary Record of the 15th Meeting of the Committee of the Whole, U.N. Conference on the Elimination or Reduction of Future Statelessness, p. 10 (1961).

ralized citizen resides abroad, and especially so where he resides in the country of his former nationality—a country which has a considerable claim upon him. History shows that this is factually, not merely theoretically, a source of difficulty in international relations. The question thus narrows: Did Congress, in view of these historical facts, act reasonably when it enacted the measures here involved?

B. THE PROVISION FOR EXPATRIATION AFTER THREE YEARS' RESIDENCE IN THE NATURALIZED CITIZEN'S FORMER HOMELAND IS A REASONABLE REMEDY FOR THE INTERNATIONAL COMPLICATIONS REVEALED BY EXPERIENCE

Section 352(a)(1) provides for the expatriation of naturalized American citizens who return to their former homeland and continuously reside there for more than three years.[22] The principal questions are whether Congress has the power to expatriate American citizens because of long residence abroad and, if so, whether it can decide to provide for the expatriation of naturalized citizens who reside in their former homeland but not make comparable provision for native-born citizens who live abroad. These two issues are so interrelated that they cannot properly be treated separately. What Congress has found, in substance, is that long residence abroad by naturalized American citizens in their former homelands creates problems which are far more serious than those presented by residence abroad of native-born citizens, and that these problems, in their more aggravated

[22] In a separate provision not involved in this case, Section 352(a)(2), Congress dealt with the related problem of naturalized citizens residing in countries other than of their origin.

form, can only be dealt with effectively by loss of nationality. We submit that Congress' decision to limit the application of Section 352(a)(1) was both reasonable and constitutionally permissible.

1. Section 352(a)(1) is an Exercise of Congress' Powers in the Field of Foreign Relations

In each of the cases in which this Court has sustained an expatriation statute, it has concluded that Congress was acting under its well-settled power to regulate the relations of this country with other nations. *Mackenzie* v. *Hare*, 239 U.S. 299, 311–312; *Savorgnan* v. *United States*, 338 U.S. 491, 500; *Perez* v. *Brownell*, 356 U.S. 44, 57–60; see *Lapides* v. *Clark*, *supra*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860.

It is abundantly clear from the foregoing recitation of the diplomatic and legislative background of Section 352(a)(1) (pp. 15–50 above) that the problem with which it deals has been a persistent one in the foreign relations of the United States and that Congress, in enacting it, "was seeking to effectuate its power to regulate foreign affairs." *Perez* v. *Brownell*, 356 U.S. 44, 57. Indeed, it is fair to say that no other expatriation provision—including the one sustained in *Perez*—is supported by such extensive evidence of serious diplomatic problems and sincere governmental efforts to resolve them. Since the power of Congress to employ the remedy of expatriation where reasonably necessary to solve foreign affairs problems is well settled, the question remains whether "the means—in this case, withdrawal of citizenship—[is] reasonably related to the end—here, regulation

of foreign affairs." *Perez* v. *Brownell, supra,* 356 U.S. at 58.

2. A "Rational Nexus" Exists Between Expatriation and the Problems Congress Sought to Remedy

The "rational nexus" between the problems stemming from foreign residence of naturalized citizens in the countries of their origin and expatriation is readily apparent from the background of Section 352(a)(1). Experience has repeatedly shown that the residence of naturalized citizens in the country of their former nationality presents problems of a quite different order from those presented when a native-born American takes up residence abroad. If the naturalized American is a former national of the foreign country in question, that country, almost invariably, will give weight, in one way or another, to the factor of prior nationality. It may refuse to recognize the initial change of allegiance; it may take the view that the resumption of residence in the native land effects a full repatriation; it may merely insist that the returning national perform various obligations and services. The longer the naturalized citizens remain, the greater the probability not only that they will become involved in difficulties, but also that their native countries will rebuff American efforts to intervene. When the relations between the United States and the native land are strained, as has been true in our relations with "iron curtain" countries, the frictions and embarrassments have been aggravated. Surely, so long as nationality prior to naturalization is a factor which is generally regarded by the countries of the

world as one of significance, it cannot be said that it is irrational for Congress to regard the return of naturalized citizens to the countries of their former nationality as a problem in the conduct of foreign affairs.

In these situations, as in *Perez* v. *Brownell,* "it is the possession of American citizenship by a person committing the act [here, protracted residence in the country of his origin] that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations." 356 U.S. at 60. If the person who has chosen to reside in his native country is no longer an American citizen, there will be no demands for assistance by the United States, no potentiality for creating conflict with the native country or for embarrassing this country in the conduct of its foreign relations. In short, "[t]he termination of citizenship terminates the problem." *Ibid.* Accord, *Trop* v. *Dulles,* 356 U.S. 86, 106 (Mr. Justice Brennan concurring).

Since Section 352(a)(1) is a rational and appropriate means of dealing with serious problems confronting Congress, there is no occasion to examine "alternative methods of achieving the purposes of its legislation" (see App. Br. 43). It is well settled that, in reviewing a Congressional enactment, this Court does not "inquire into the degree of its necessity" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 423), because "all means which are appropriate, which are plainly adapted to [the] end, which are not prohibited, but consist with the letter and spirit of the con-

stitution, are constitutional" (*id.* at 421). Congress has discretion to select among several means, all of which are appropriate, whichever it deems desirable; choosing among such rational alternatives requires a political, rather than a legal, judgment. And it is particularly important that Congress be afforded ample latitude and flexibility in making this choice when legislating in the complex and sensitive area of foreign affairs. As this Court said in discussing the same kind of problem in *Perez* v. *Brownell, supra,* 356 U.S. at 60:

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose.

Moreover, nothing emerges more clearly from the diplomatic and legislative background of Section 352(a)(1) than that Congress felt that every other reasonable mode of dealing with the problem at hand had been exhausted and that expatriation was the best alternative available. A solution by means of naturalization treaties had been attempted, but many countries had proved unwilling to enter into such agreements (see pp. 27–28 above). A statutory presumption of expatriation had been attempted, but this had proved almost impossible to administer (see pp. 36–37 above). The denial of diplomatic protection or other relief had been repeatedly attempted; however, both the 1906 State Department board and the 1938 cabinet committee pronounced it unsatisfactory (see pp. 33–34, 37–39 above). It was not until all of these

remedies had been tried and found wanting that Congress resorted to outright expatriation.

The Department of State, in conjunction with Congress, has formulated a broad policy to apply to the protection of American citizens aboard. An integral part of American foreign policy is the government's commitment to protect all citizens, both native-born and naturalized. This policy implements an 1868 statute (see p. 24, note 15) which commands the President to protect all citizens from imprisonment by a foreign government by using "such means, not amounting to acts of war, as he may deem necessary and proper * * *." Rev. Stat. §§ 2000–2001 (1875).[34] One application of the policy results in restricting travel to countries where protection is impossible. Another application is Section 352(a)(1) which expatriates citizens whose protection is apt to cause serious friction and embarrassment. This general policy has three important advantages: (1) it guarantees every citizen that this country will take steps to protect him; (2) when appropriately implemented, it tends to deter other countries from lightly interfering with the rights of American citizens;[35] and (3) it avoids the friction

[34] Due to an oversight which has no legal effect, the statute was omitted from the 1958 edition of the United States Code. Section 2000 of the Revised Statutes requires that the President give the same protection to naturalized and native-born citizens overseas.

[35] As the report of the cabinet committee underlying the 1940 Act stated, "[A] definite provision for the termination of American nationality * * * will have the effect of persuading foreign states * * * to recognize the American nationality [of naturalized citizens] when they return to their countries of origin for legitimate objects and for residence of a temporary character." *Nationality Laws*, *supra*, p. 71.

and embarrassment which inevitably arise when protection is impossible or wholly inadequate.

On the other hand, it would be embarrassing to this country, *vis-à-vis* other nations, if the right of American citizens to diplomatic protection were less than the full measure. As the Citizenship Board studying these problems observed in 1906 (see pp. 33–34 above), denial of protection to the citizen is an inadequate solution. And, as Assistant Legal Adviser Flournoy emphasized in the hearings prior to the 1940 Act (see p. 40 above), failure of this country to give protection to citizens in some instances makes it more difficult to enforce it in others.

Moreover, denial of protection does not necessarily solve the basic problem caused by residence of naturalized citizens in the countries of their former nationality. At a minimum, recognition of United States nationality must include the right to return to the United States. As has been seen (pp. 21–46), the existence of this right can cause international complications when a foreign government treats a naturalized American citizen for a long period of time as one of its own citizens and therefore refuses to allow him to leave the country.

Not all international crises have occurred because two nations deliberately chose to follow paths which caused them to collide; some crises have been the product of accident rather than deliberation, as when an unanticipated event cast two nations on opposite sides of a controversy, and neither could uncover a means of withdrawing with honor. The vagaries of international politics often create situations in which

decisions are impelled rather than selected rationally. Expatriation of naturalized citizens residing in their countries of origin avoids such situations, for it constitutes a clear and total renunciation of all interest in their future actions. It invokes the established principle of international law that, once a citizen has been expatriated, the expatriating sovereign cannot claim the right to protect him. See Jessup, *A Modern Law of Nations* 99 (1948). In contrast, a denial of protection does not constitute a total renunciation of interests, as it leaves intact the person's citizenship. As long as that connection remains, this country has the right to intervene on his behalf, and there will always remain the possibility of pressures, both foreign and domestic, to make some efforts on his behalf. It is entirely reasonable for Congress to establish a complete separation between persons whom this country will vigorously defend and those in whom it renounces all interest. Such a clear definition of American responsibility is plainly adapted to avoiding international tensions created by misunderstanding.

C. THE TENDENCY OF THREE YEARS' RESIDENCE BY A NATURALIZED CITIZEN IN HIS COUNTRY OF ORIGIN TO WEAKEN HIS ALLEGIANCE TO THE UNITED STATES IS FURTHER EVIDENCE THAT SECTION 352(a)(1) IS A REASONABLE REGULATION OF CITIZENSHIP

The United States, as a sovereign nation, has the undoubted power to regulate its own national citizenship as an inherent right of sovereignty. Besides its inherent power over citizenship, Congress also has power explicitly conferred by Article I, Sec. 8, cl. 4, "[t]o establish a uniform Rule of Naturalization."

Cf. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668; *Mackenzie* v. *Hare*, 239 U.S. 299, 311. As this Court recognized in *Luria* v. *United States*, 231 U.S. 9, 22, there is an inescapable relationship between citizenship and the citizen's allegiance to his country:

> Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.

It follows, we submit, from these premises, that it is within the power of Congress to terminate a person's American citizenship where his conduct manifests a withdrawal or transfer of his allegiance to the United States.

This view seems to have been adopted in *Perez* v. *Brownell*, 356 U.S. 44, 60–61, where this Court observed that Congress had interpreted the conduct involved there (voting in a foreign election):

> as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

We do not read that statement, as does appellant (Br. 60–61), to mean that only acts from which a withdrawal or transfer of allegiance can be inferred may be the subject of expatriation legislation. As we read the Court's opinion, this fact was cited as an additional source of Congressional power—the power to regulate citizenship (and with it, the authority to

deal with serious compromises of allegiance). Certainly, if the act of voting, which this Court relied on in the *Perez* case, shows a transfer of allegiance, prolonged residence in one's former homeland is even more convincing. Voting can be accomplished in a moment and can be without personal significance, especially if done without awareness of the legal consequences. Residence for a number of years, particularly in a country of former nationality, almost inevitably involves a fundamental transfer of interest and often of allegiance.

As we noted above (pp. 15–18), the Constitution embodies the concept, inherited from England, that citizenship is a gift which may be bestowed with conditions subsequent, as well as precedent. That concept is reflected in the language of the Constitution itself which gives naturalized citizens less right to hold political office than native-born citizens. Moreover, as the records of the Convention and the First Congress show, the framers intended Congress to have such power independent of the language in the text of the Constitution (see pp. 16–18 above). To be sure, that concept has been limited. On most issues the views expressed, as *dictum*, by Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 738, 827–828—that the naturalized citizen stands on the same footing as the native born—are no doubt controlling. But this has never been taken to mean that Congress may not take steps to assure itself that the naturalized citizen will not revert to his former allegiance. Congress and this Court have repeatedly recognized that, in this context, residence is a matter of direct rele-

vance. See, *e.g.*, 34 Stat. 597; 66 Stat. 259, 8 U.S.C. 1449; *Luria* v. *United States*, 231 U.S. 9.

The reasoning of the *Luria* and *Perez* cases is supported both by sociological evidence and by international law. Whatever variations there may be in individual cases, most aliens returning to the country of their former nationality present problems of "acculturation," to use the anthropologist's term. The values and attitudes of men are shaped by the cultures in which they live. Linton, *The Cultural Background of Personality* 27–29 (1945). When a person moves from one culture to another, his values and attitudes will tend to change in the directions shaped by the new culture. However, the values acquired in early years, especially those transmitted through one's parents, tend to be more permanent and more resistant to change than values acquired later in life. *Id.* at 141–144. Sociological studies of immigrants living in the United States reveal that it often takes many years to overcome the conflict between the old and the new. See Glazer & Moynihan, *Beyond the Melting Pot* (1963); Lee, *The Chinese in the United States of America* (1960); Pisani, *The Italian in America* (1957); *American Minorities* (Barron ed., 1957); see also DeVries, *Man in Rapid Social Change* (1961).

Viewed in this light, the usual effect of a naturalized citizen's return to the country of his former nationality is not only to suspend the evolutionary process toward involvement in American society, but to strengthen the old ties at the expense of the new ones. Since the ties formed in childhood are stronger than

these acquired later in life, this regression will occur at a rapid pace and can, in a relatively short time, erase all substantial ties to this country. As Professor Bar-Yaacov has recently written: "nationals living abroad tend to dissociate themselves from the national life of their State and are likely to lose the characteristics normally expected of a national." *Dual Nationality* 261 (1961). And a leading authority on the foreign affairs of the United States has likewise stated that (Borchard, *The Diplomatic Protection of Citizens Abroad* 701 (1915)):

> The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen to his country.

When the naturalized citizen resumes permanent residence in the country of his origin, the pressures and temptations to revert to his old allegiance will be strong indeed. He will often be surrounded by his family and old friends whose only tie is with the native land.[28] Frequently he will marry a native, and his children will be born and raised there, with no real connection to his adopted country. He will generally resume old habits of living, including the language and customs of the native land. He will normally

[28] Secretary of State Fish observed in 1873 (Fish to Grant, Aug. 25, 1873, 2 *For. Rel. U.S.* 1190(1873)): "While the principle on which rests the right of protection while in foreign countries of the naturalized is the same with that of the native-born citizen, there is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him * * *."

be dependent for his livelihood on the economy of the country in which he resides.

The importance of residence was recognised by the International Court of Justice in the *Nottebohm* case (second phase) (*Liechtenstein* v. *Guatemala*), I.C.J. Rep. 4 (1955), which involved a German national who had lived in Guatemala for thirty-five years without becoming naturalised; had transferred his citizenship from Germany to Liechtenstein at the outbreak of the Second World War; and, after spending only four days in the latter country, had returned to Guatemala. The court held that, under principles of international law, Liechtenstein had no standing to assert claims against Guatemala on behalf of Nottebohm, for, as between the two countries, he was a citizen of Guatemala. The court reasoned (*id.* at 23):

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence on reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

International tribunals, the court said, do not view nationality merely as a legal status conferred by a particular country (*id.* at 22):

> They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Professor Bar-Yaacov has similarly stated (*Dual Nationality* 259–260):

> In other cases [nationality] legislation has attempted to ensure that nationality will be possessed by persons whose manner of upbringing and surrounding conditions throughout their life have enabled them to develop the 'nationality characteristics' which are essential for the performance of the duties of nationals and entitle them to the rights and privileges bound up with the status of nationality. That is why residence requirements represent a salient feature of the laws of many countries. The importance attached to residence in a particular country as a proof of the identification of the individual with this country and, thus, as a pre-

requisite for the possession of nationality, is based on sound principle. An individual living in a particular society acquires its language, habits and aspirations through immediate and daily contact. * * *

It may also be noted that, *generally, the conditions for naturalisation aim at ensuring the sufficient assimilation into the national life of the country of the potential citizen, or of the new citizen. Here, again, residence requirements, either prior or subsequent to naturalisation, play a prominent part.* [Emphasis added.]

The problem of allegiance and assimilation which occurs in the case of naturalized citizens returning to their former homelands is not a mere theoretical one. On the contrary, it was considered by Congress in passing the provision in the Nationality Act which was the identical predecessor to the Section of the 1952 Act involved here. It is perfectly clear that both the 1938 cabinet committee on which Congress relied and Congress itself regarded protracted residence by a naturalized citizen in the country of his birth or former nationality as importing a serious compromise of his allegiance. The cabinet committee, for example, observed that such residence "has rendered it difficult to make fully effective the principle, which this Government has long sought to maintain, that naturalization involves a complete change of national character and termination of prior allegiance." *Nationality Laws of the United States,* Part I,

House Committee Print, 76th Cong., 1st Sess. 71 (1938). The committee went on to explain (*ibid.*):

> Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated.

In its letter of transmittal to the President, the committee explained that a basic purpose of all of the proposed expatriation provisions was "to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States." *Nationality Laws, supra,* p. vii. It also stated, after observing that naturalization is conditioned on an intention to reside in this country permanently that (*ibid.*):

> When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.

In testifying on the draft statute, Mr. Flournoy, the Assistant Legal Advisor of the State Department, said that (*Hearings before the House Committee on*

Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 36-37):

> [A] still more serious reason why the Department of State is interested in this measure is that under the laws now existing we have thousands of persons living in foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and they may call on our Government for protection.
>
> I refer not only to the naturalized citizens who have gone back to their native lands or gone to other countries—and there are many thousands of them—but to their children, born in those countries, who are alien in all of their characteristics and connections and interests, yet have the right to enter the United States as citizens.

The Senate report on the bill that became the Nationality Act of 1940 stated (S. Rep. No. 2150, 76th Cong., 3d Sess. 4):

> These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country.

During the debates, the chairman of the committee reporting the bill, Representative Dickstein, emphasized that the purpose of the bill was to terminate the citizenship of "those who reside in foreign lands and

only claim citizenship when it serves their purpose" (86 Cong. Rec. 11944), and the bill's sponsor, Representative Rees, observed that a naturalized person residing in his native land "is not likely to have any real attachment to the principles of the Constitution of the United States" (86 Cong. Rec. 11948).

The relationship between residence and allegiance underlies the requirement for residence before naturalization which has been part of our system from the beginning. This relationship is also meaningful in reverse, particularly when the residence is in the country of former nationality to which, in most cases, the cultural ties are close. Surely it was reasonable for Congress to conclude that the native's reversion to a supposedly abandoned way of life would put such a strain on his American allegiance that it could not normally be expected to survive. By the same token, Congress was warranted in concluding that his allegiance to his native land might be significantly revived. Obviously expatriation, not merely loss of protection, was necessary to remedy this problem. Accordingly, we submit, it was a reasonable exercise of the Congressional power to regulate citizenship and to deal with serious compromises of allegiance for Congress to provide for the expatriation of naturalized citizens who return to their former homeland for a long period of time.[37]

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[37] Appellant contends (Br. 70–73) that Section 352(a)(1) creates "a conclusive presumption that naturalized citizens have abandoned their allegiance to the United States." A conclusive presumption cannot be rebutted and is not properly a presumption at all; instead, it is actually a misleading name

Moreover, it must be emphasized in the present case that appellant's American citizenship was granted upon the foregoing terms. The 1940 Act had the same provision as the 1952 Act—expatriating any naturalized citizen who returned to his former homeland for over three years. Consequently, when appellant's mother was naturalized and appellant herself acquired citizenship by derivation in 1950, Congress had already imposed as a condition of naturalization that the citizen not return to his former homeland for over three years. When appellant broke this condition, she automatically lost her citizenship.

D. THE DIFFERENTIATION BETWEEN NATIVE-BORN AND NATURALIZED CITIZENS IS NOT INVIDIOUS BECAUSE IT IS ONLY THE RESIDENCE OF NATURALIZED CITIZENS IN THE COUNTRY OF THEIR ORIGIN THAT CAUSES THE INTERNATIONAL COMPLICATIONS THE STATUTE SEEKS TO ALLEVIATE

Appellant contends (Br. 22–57) that Section 352(a)(1) discriminates invidiously against naturalized citizens in violation of the due process clause of the Fifth Amendment. Her argument is that it is both too

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for an ordinary rule of law because its sole effect is to attach legal consequences to particular conduct. 9 Wigmore, *Evidence*, Sec. 2492 (3d ed., 1940); McCormick, *Evidence*, Sec. 308 (1954); Morgan, *Basic Problems of Evidence* 31 (1961). Thus, Section 352(a)(1) provides for expatriation when a naturalized citizen returns to his former homeland. This provision is proper, not because in all such instances the citizen creates international problems or transfers his allegiance, but because this often occurs. As we will show (pp. 77–80), Congress has the power to use general classifications in attempting to remedy evils before it as long as those classifications are reasonably related to the problem even though the problem is not in fact produced by every person within the classification.

narrow and too broad—that it invidiously discriminates because it applies only to naturalized and not all citizens; and that it also invidiously discriminates by including all naturalized citizens, not only those particularly likely to cause international problems. We will discuss below (pp. 77–81) whether Congress was required to confine Section 352(a)(1) more narrowly than it did. Here, we will show that Congress did not discriminate invidiously against naturalized citizens.

Appellant's contention, if correct, would mean that Congress has the power to expatriate all American citizens residing in any foreign country for three years, but could not enact a more narrowly confined statute limited to naturalized citizens who returned to their former homelands.[28] We submit that the virtue, not the vice, of the present statute is that it is narrowly drawn. We have seen that the greatest likelihood of citizens embroiling the United States in foreign conflict as a result of their residence abroad, as well as the greatest likelihood that citizens residing for a long time abroad have transferred allegiance to a foreign country, is in the case of naturalized citizens returning to their former homelands. Congress in Section 352(a)(1) enacted a statute restricted to these precise situations.

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[28] Elsewhere, appellant contends (Br. 57) that Congress has no power to provide for the expatriation of any citizens for residence abroad. Here, however, we are considering only appellant's claim that naturalized citizens are being arbitrarily discriminated against.

In dealing with other problems of foreign residence, Congress has recognized that not all are of the same degree of seriousness. Thus, residence by a naturalized citizen in a country other than the one of his origin is somewhat less likely to cause the kind of problem with which Congress was most concerned; therefore, the period of residence before expatriation takes place is five years instead of three, and the exceptions to this five-year provision are much broader than those applicable to the three-year provision involved in this case.[*] Similarly, certain classes of foreign-born persons who are citizens at birth are considered to be a sufficiently potential source of difficulties (albeit less so than naturalized citizens) that they are subject to certain disabilities and requirements in relation to residence abroad (see pp. 73–74 below). Plainly, Congress may thus legislate in proportion to the problem perceived; it may attach grave consequences to what it considers to be the most serious and troublesome conduct and lesser consequences to conduct not deemed to be of equal danger. *E.g., Hirabayashi* v. *United States,* 320 U.S. 81, 100; *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S, 483, 489. Indeed, it would be irrational for Congress to act otherwise.

The test under the Fifth Amendment is whether the classification in question has a foundation in reason. As the Court pointed out in *Bolling* v.

[*] Cf. Section 353, 8 U.S.C. 1485, with Section 354, 8 U.S.C. 1486. Illustrative is the fact that appellant would have been free to reside permanently in a country other than Germany (the country of her origin) because she qualifies under one of these broader exceptions (see App. Br. 25).

Sharpe, 347 U.S. 497, 499, "discrimination may be *so unjustifiable* as to be violative of due process" (emphasis added). But, as the quotation implies, not all differentiations are banned.

As we have seen above, Congress had persuasive reasons for limiting the statute to naturalized citizens returning to the country of their former nationality. In terms, the statute does not even discriminate between naturalized and native-born citizens since the latter have no country of former nationality. It is true, of course, that the native-born citizen can reside in *any* foreign country without loss of citizenship, while Section 352(a)(1) restricts the period in which naturalized citizens may reside in one country.[40] This Court, however, has many times upheld distinctions of more significance and impact. See, *e.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (ancestry); *Terrace* v. *Thompson*, 263 U.S. 197 (alienage); *Heim* v. *McCall*, 239 U.S. 175 (alienage); *Porterfield* v. *Webb*, 263 U.S. 225 (alienage); *Ohio ex rel. Clarke* v. *Deckebach*, 274 U.S. 392 (alienage). In each of these cases, the Court sustained differentiations of treatment as among different classes of persons upon a showing that the classification was reasonably devised to meet a demonstrated need. Likewise, in *Mackenzie* v. *Hare*, 239 U.S. 299, on the basis of far less compelling evidence than that supporting Section 352(a)(1), the Court sustained a statute suspending the citizenship of American

[40] Section 352(a)(2) provides for the expatriation of naturalized citizens who reside five years in any country other than their homeland but that section is not involved in this case.

women who married foreigners, even though the citizenship of an American male was not subject to suspension upon marriage to a foreign woman.

Distinctions between native-born and naturalized citizens in connection with foreign residence have a basis in almost 175 years of history. Indeed, as we have seen (pp. 16–17), the Constitution draws several such distinctions itself. Thus, only a natural-born citizen may become President. Art. II, Sec. 1. A naturalized citizen must wait at least seven years after he obtains his citizenship before he is eligible to sit in the House of Representatives, Art. I, Sec. 2, and he must wait at least nine years before he can sit in the Senate, Art. I, Sec. 3. In the very first Congress it was proposed to expatriate naturalized citizens who resided abroad, and there was no objection on constitutional grounds during the debate (see pp. 17–18 above). During the nineteenth century, only naturalized citizens were, as a general rule, expatriated or denied protection on grounds of foreign residence (see pp. 23–24, 28–29 above). For nearly 100 years our naturalization treaties have provided for expatriation of naturalized citizens upon the basis of foreign residence (see pp. 27–28, 46 above). Despite the detailed criticisms by numerous groups of the 1952 Act before it was adopted—including Section 352(a)(2)—not a single witness at the hearings objected to Section 352(a)(1). Indeed, it is significant that even so severe a critic of the present immigration and nationality laws as Americans for Democratic Action suggested that this section was a reasonable

regulation (see pp. 42–43 above). And at least 26 other countries expatriate naturalized, but not native-born citizens, who reside abroad (see pp. 46–49 above).

The present citizenship laws of this country contain a number of additional differentiations between classes of native-born citizens, none of which seems open to serious question. Thus, under Section 301(a)(7), (b) of the Immigration and Nationality Act of 1952, a foreign-born child of one citizen parent and one alien parent, though a native-born citizen of this country, loses that citizenship if he fails to come to the United States prior to the age of twenty-three to live for at least five continuous years;[41] foreign-born children of two citizen parents have no such obligation. Under Section 350, a native-born citizen of dual nationality loses his citizenship if he resides for three years in the country of his other nationality and claims benefits from that country after the age of twenty-one, unless, prior to the expiration of the three-year period, he takes an oath of allegiance before an American diplomatic or consular official;[42] no such disability attaches to native-born citizens who do not happen to have another nationality.[43]

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[41] 66 Stat. 235, 8 U.S.C. 1401(a)(7), (b). In order for the child to qualify as a citizen under this provision, the citizen parent must have resided in the United States for ten years, five of which were after the age of fourteen. Appellant's children are governed by this provision.

[42] 66 Stat. 269, 8 U.S.C. 1482. Appellant's children could be subject to this provision.

[43] There are other provisions relating to loss of nationality which apply only to dual nationals. See 66 Stat. 267, 8 U.S.C. 1481(a)(4)(A), (b).

There is nothing "invidious" about the distinction Congress made when it enacted Section 352(a)(1) (see App. Br. 22–57), nor does that distinction brand naturalized citizens as an inferior group of citizens (App. Br. 23–31). It simply recognizes, on the basis of experience and history, that naturalized citizens—through no real fault of their own—are very likely to become international problems when they reside at length in the country of their origin—far more likely than other citizens residing abroad. Congress, seeking in good faith to avoid such problems, perforce had to focus on the group which gives rise to them, but it did not do so "invidiously." In effect, it called upon all naturalized citizens either to cooperate with this, their adopted country, by not putting themselves in a position where they were likely to bring it into conflict with other nations, or to accept the only alternative calculated to resolve any difficulties that might attend their refusal thus to cooperate: termination of their citizenship. That they must make this choice is no reflection on their loyalty or reliability (see App. Br. 36–42); it is dictated by the hard facts of experience in the foreign relations of this country.

It is relevant, too, in considering the reasonableness of the classification adopted in Section 352(a)(1), that, generally speaking, its effects are far less severe

as applied to naturalized citizens than they would be as applied to native-born citizens. In many instances, the naturalized citizen will also be a citizen of the country of his origin, so that he will not be rendered stateless; in most other instances (as in this case), his peculiar connection with that country will make it easier for him to obtain its citizenship." In any event, he will be resident in the country of his birth or former citizenship (or both), which will ordi-

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" We have been able to acquire information on the nationality, laws of 74 countries and have found that, after three years' residence, a naturalized citizen would either have, or be eligible to reacquire, citizenship in 56 countries—because he did not lose his citizenship by being naturalized in the United States, because he automatically reacquired citizenship under the provisions of a Bancroft treaty after a residence of less than three years, or because he could be naturalized after a residence of three years or less. The laws of the remaining 18 countries create varying periods of statelessness. In ten countries (Austria, Cuba, Ghana, Indonesia, Ireland, Liberia, Pakistan, Saudi Arabia, Southern Rhodesia, and Yugoslavia), a residence of two years or less would be required in addition to the three years which gave rise to expatriation by this country. Reacquisition of citizenship in the Sudan would require an additional seven years, and in San Marino an additional 33 years. In Belgium and Malaysia, it would require an additional residence of from one to eight years, depending upon how long the applicant resided in those countries before his emigration. Reacquisition of citizenship in Paraguay and Rumania requires an act of the legislature. Albania and Poland appear to treat reacquisition as discretionary.

narily mean that he has family connections and old friends there, speaks the language, understands the customs—in short, that he will find it relatively easy to become reassimilated into the population from which he originally sprang and to which he has chosen to return. By contrast, the native-born American citizen would usually have few if any of these special associations other than those he might have accumulated during the period of residence prescribed in the statute. He would be in a markedly more difficult position to pick up the threads of a normal existence in a new country. Consequently, even if the foreign affairs problems were the same for naturalized and native-born citizens, Congress could have reasonably determined that the danger did not justify the serious consequences of expatriation to native-born citizens but did justify the far lesser consequences to naturalized citizens.

In short, Congress, in order to meet the foreign affairs problem confronting it, was not required to say that no citizen, native-born or naturalized, could reside in any country for more than a given period without expatriating himself when experience has shown that the problem of naturalized citizens residing in the country of their origin has far greater potential for causing problems than foreign residence

by citizens under other circumstances. Congress was not required to legislate with respect to all citizens in the name of equality or what Mr. Justice Holmes referred to as "abstract symmetry." *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144. Instead, Congress may legislate with respect to one problem at a time; it "may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, *supra*, 320 U.S. at 100; accord, *United States* v. *Petrillo*, 332 U.S. 1, 8–9; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489; *Patsone* v. *Pennsylvania*, *supra*. Congress did exactly that in Section 352(a)(1). Its decision was not unreasonable.

B. THE STATUTE IS NOT ARBITRARY BECAUSE IT IS NOT MORE NARROWLY DRAWN

Appellant contends (Br. 42–43) that Congress acted arbitrarily in making foreign residence the controlling fact under Section 352(a)(1) because foreign residence alone does not give rise to problems with other countries. She goes on to argue that such problems arise "only when such residence is accompanied by other factors such as dual nationality and refusal of a foreign state to recognize American naturalization." We submit that this claim is based on an extraordinarily narrow view of Congress' power to regulate areas within its authority.

Congress has the power, in regulating problems before it, to legislate by making classifications. In doing so, the classification must bear a direct relationship to the problem which the statute seeks to remedy. Otherwise, the statute is invidiously discriminatory in violation of the due process clause of the Fifth Amendment. On the other hand, classifications may include persons who, as a matter of fact, do not pose the precise problem at which the statute is aimed.

These propositions are based directly on numerous decisions of this Court. In *Westfall* v. *United States*, 274 U.S. 256, 259, the Court stated that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented, [Congress] may do so." Similarly, in *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 710–711, the Court stated: "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. See also, *e.g.*, *American Communications Assn.* v. *Douds*, 339 U.S. 382, 406; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201–202, and the cases therein cited.

Applying these rules here, serious foreign conflicts have arisen, as we have seen, as a result of prolonged residence of naturalized citizens in their former homelands. Congress was not required to limit the application of the statute to those individuals whose residence abroad actually caused international difficulties. As this Court pointed out in the *Perez* case, Congress must have latitude to regulate matters affecting the

foreign affairs of this country "on more than an *ad hoc* basis." 356 U.S. at 59. Thus, the Court in that case did not restrict Congress to providing for loss of nationality only with respect to foreign voting that in fact stirred up an international controversy or even to such voting in countries which objected to voting by aliens. Section 352(a)(1), as shown above, is an effective means of relieving international tensions for the very reason that it expatriates naturalized citizens *before* they create difficulties. To require Congress to wait until the difficulties occur, as appellant suggests (Br. 46), would frustrate the entire purpose of the provision. Manifestly, individualized treatment is not required in relation to such a general problem as the conduct of international affairs.

Similarly, Congress could reasonably decide to provide for expatriation even though the Department of State had not ascertained that conflicts would likely result with the particular country involved. Appellant states (Br. 42) that problems have arisen only where the citizens were dual nationals either because the foreign state refused to recognize American naturalization or because the naturalized citizen's return for a substantial period of time automatically resulted in the reacquisition of citizenship. In addition, however, such difficulties have also arisen because the foreign government believed that its former citizen owed obligations to it beyond those of the ordinary alien residing within its territory, even though he did not actually reacquire his old citizenship. To require the Secretary of State to ascertain whether such conturned for a substantial period of time automatically

ditions existed in each country would require subtle determinations involving not only the law but the policies of scores of foreign states and their application to a variety of different circumstances. It would not be enough to make such a determination on the existing facts; one would have to make predictions for the future. The reason for the present statute is that Congress found that the previous provisions were extremely difficult to administer and therefore failed to solve the foreign affairs problems (see pp. 36–37 above). Moreover, even if such determinations were feasible, the result would be very unfair to naturalized citizens residing abroad. In place of the clear standards provided in Section 352(a)(1), there would be uncertain ones: the citizen would not know whether he had expatriated himself until a determination was made, *i.e.*, after the die was cast. His rights would turn on the law and policies of foreign government which might change, without his knowledge, in such a way as to deprive him of his citizenship. In short, Congress could most reasonably conclude that the clear line drawn by Section 352(a)(1) was the most feasible one for efficient administration by the State Department, for the protection of naturalized citizens, and for the prevention, in advance of the event, of foreign entanglements.

Congress has in fact confined the class of persons coming within Section 352(a)(1) more narrowly than *all* naturalized citizens residing in their former homelands in order to exempt persons not likely to cause problems with foreign countries or to transfer their allegiance to them. Section 353, 66 Stat. 270, 8 U.S.C.

1485 (see pp. 3–5 above).[48] Thus, exceptions are made for persons employed by the United States government or United States companies. Section 353 (1)(4). Their open and obvious connection with this country tend to discourage inconsistent demands upon them by foreign governments; moreover, their stays are less likely to prove permanent. Certain aged and disabled persons are excepted. Section 353(2), (3), (5). Their disabilities greatly reduce the likelihood that demands will be made upon them, and they would be unlikely to be raising young children so that, if reversion to their former culture and allegiance occurred (see pp. 60–61 above), its effect would not be carried over into a new generation. Persons living abroad for purposes of education or for certain emergency reasons (such as family illness) are excepted. Section 353(5), (6). Again their residence is apt to be less than permanent. Finally, each of the exceptions—save possibly that for aged and disabled persons—deals with situations which are not inconsistent with allegiance to the United States and a desire to return here. Congress was not required to make further distinctions. The classifications established, limited by the exceptions, came as close to describing the most probable sources of international complications as could reasonably be expected.

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[48] Appellant's discussion (Br. 32, 68) of the exceptions to Section 352 is almost entirely devoted to Section 354, which contains the exceptions to Section 352(a)(2), a provision not at issue in this case. It is Section 353 that contains the exceptions to Section 352(a)(1). The exception relied on by the *amicus* (Br. 30) as to veterans also concerns only Section 352(a)(2).

II

EVEN IF SECTION 352(a)(1) WERE UNCONSTITUTIONAL IF APPLIED TO SOME SITUATIONS WITHIN ITS TERMS, IT IS REASONABLE AND THEREFORE CONSTITUTIONAL AS APPLIED TO APPELLANT, WHO IS DOMICILED ABROAD WITH NO INTENT TO LIVE IN THE UNITED STATES

We have seen (pp. 57–68) that Congress considered the fading loyalty of the naturalized citizen who returns to his homeland and the tendency to take up again its bonds and culture as important reasons justifying Section 352(a)(1). These considerations are especially pertinent in the present case. Appellant is married to a German national and makes her home in Germany. She has stated that she intends to remain with her husband where he practices his profession; that since his law practice is in Germany it appears likely that she will remain there for the indefinite future although she would hope to be able to visit the United States frequently (R. 10). Even if the statute were deemed an unconstitutional exercise of Congress' powers with respect to a naturalized citizen who merely resides in the country of his former nationality for three years, it is surely constitutional as applied to a person, like appellant, who not only resides for the requisite period in the country of her former nationality but is domiciled in that country and has no intention to return to the United States to live.

Appellant has abandoned not only her residence but her domicile in the United States for one in Ger-

many. As Mr. Justice Holmes stated in *Williamson v. Osenton*, 232 U.S. 619, 624:

> The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book, "the absence of any present intention of not residing permanently or indefinitely in" the new abode. Conflict of Laws, 2d ed. 111.

Accord, *Restatement, Conflict of Laws*, Section 18, comment *c* (1934). More recent formulations deem it irrelevant that a person retains an intent to return eventually, and they hold that domicile is acquired if the person "intends to remain in the place for a time at least." See *Restatement (Second), Conflict of Laws*, Sec. 18, comments *b, c* (Tent. Draft No. 2, 1954). Applying these principles to appellant, she is domiciled in Germany since she has no intention of returning to the United States to reside permanently either now or even in the future.

As we have shown earlier (pp. 28–36), residence in the country of former nationality without an intent to return is an expatriation standard with a long history. It was used by the Department of State to expatriate citizens in the nineteenth century; it was crucial under administrative regulations relating to the presumption of expatriation under the 1907 Act; and it has been the standard used for one hundred years to expatriate naturalized citizens under the Ban-

croft treaties.[46] Surely a practice deemed reasonable by so many persons for so many years, and whose constitutionality was never questioned before the instant case, is neither arbitrary nor irrational.[47] All of the reasons discussed above, which justify the statute on its face, apply with even greater force to aliens residing in the country of their former nationality and maintaining their permanent homes there. Such persons are the ones most likely to be subject to demands by the country of their prior nationality; they are also most likely to renew full attachment to the country of residence and to lose all meaningful ties to the United States.

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[46] Bancroft treaties are now in force with twenty-one countries. The treaties with twenty countries provide for the expatriation of naturalized citizens who reside in their native countries without an intent to return to the United States. Two years' residence creates a rebuttable presumption of lack of intent to return. The treaty with the remaining country, Belgium, makes no mention of expatriation; it merely provides for a naturalized citizen's reacquiring his original citizenship by returning to Belgium and complying with her citizenship laws. See 16 Stat. 747.

The validity of the treaties with twenty countries incorporating a standard similar to Section 352(a)(1) as applied to appellant will be affected by the outcome of the instant case. Whether a treaty can be invalid under the Fifth Amendment presents a delicate question of constitutional law which this Court has never decided. See "Memorandum of the Department of Justice on S.J. Res. 130, 82d Congress, Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements." *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 130*, 82d Cong., 2d Sess. 396.

[47] During the nineteenth century, the propriety of expatriation on such grounds was questioned, but to our knowledge no one challenged its rationality or Congress' constitutional power.

Moreover, the impact of the expatriation law upon the individual is much less onerous when the naturalized citizen has no desire to return to the United States. He is not actually barred from the country of his adoption. Instead, the expatriate loses only the diplomatic protection of the United States, the opportunity to make visits without a visa, and the right to return if adversity or some other unforeseen circumstances makes this desirable some time in the future. In effect, appellant is seeking the benefits of citizenship while remaining a foreigner. Cf. *Luria v. United States,* 231 U.S. 9. Surely Congress is not constitutionally required to allow citizenship to be retained in such circumstances.

The statute may thus be sustained as to appellant without the necessity of deciding its validity in other situations. This Court held in *United States* v. *Raines,* 362 U.S. 17, that state voting registrars had no standing to contend that the broad language of a civil rights statute permitted unconstitutional applications when that statute, as applied to them, was plainly constitutional. The Court went on to say (*id.* at 21):

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the ne-

> cessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration,* 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

See, generally, Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 82–106 (1937). Moreover, all doubt as to the intent of Congress in the instant case is removed by Section 406 of the Immigration and Nationality Act of 1952, 66 Stat. 281 (see p. 5 above) which specifically provides that the invalidity of a particular application of any provision of the Act shall not affect the validity of other applications. Consequently, since Section 352(a)(1) is reasonable and constitutional as applied to appellant, it is irrelevant that it might arguably be unconstitutional as applied to other persons in different situations.

III

SECTION 352(a)(1) IS NOT PENAL IN NATURE AND THEREFORE DOES NOT VIOLATE THE FIFTH, SIXTH, OR EIGHTH AMENDMENTS

Appellant advances two arguments which rest upon the premise that the statute is punitive: first, that punishment has been imposed without the procedural

safeguards required in criminal proceedings by the Fifth and Sixth Amendments (Br. 64–69); and second, that the punishment is cruel and unusual in violation of the Eighth Amendment (Br. 73–75). The short answer is that the statute is not penal.

This Court held in *Trop* v. *Dulles*, 356 U.S. 86, 96, and reaffirmed in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169, that in determining whether a law is penal, the primary question is the purpose of the statute. Appellant does not point to a single word in the legislative history that would suggest a penal purpose for the enactment of Section 352(a)(1). Nor could she, for, as we have seen (pp. 15–46), the whole background of the statute, as well as its immediate legislative history, shows that it was enacted to accomplish regulatory purposes: first, to meet the foreign policy problem when naturalized citizens in the former homeland are treated by the foreign governments as their own citizens; and, second, to remove citizenship from persons who are likely to have retransferred their primary allegiance from the United States to the country of their origin.

Only when the legislative history is inconclusive will this Court look to other factors in determining whether a statute is penal. *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 169. Since the legislative history of Section 352(a)(1) shows conclusively that it was not designed to impose punishment, appellant's reliance upon the other factors enumerated in *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 168–169, is misplaced.

Even were the history less persuasive and the factors listed in the *Mendoza-Martinez* opinion applied to Section 352(a)(1), the Section would still not be penal. The statute is an appropriate and reasonable means of solving the problems created by the prolonged residence of naturalized citizens in their countries of origin. The mere fact that a statute provides for expatriation does not render it penal. *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 164. Otherwise, contrary to the decisions of this Court, expatriation would always be invalid unless imposed after a criminal trial. See *Perez* v. *Brownell,* 356 U.S. 44; *Savorgnan* v. *United States,* 338 U.S. 491; *Mackenzie* v. *Hare,* 239 U.S. 299. Expatriation for continuous residence abroad has traditionally been regarded as regulatory rather than penal. See U.N. Secretariat, Dept. of Social Affairs, *A Study of Statelessness* '39 (1949); Jessup, *A Modern Law of Nations* 75–76 (1948). Thus, in the United States, it has been regarded for well over a century as a means of preventing conflict with foreign countries.

The statute does not promote the traditional aims of punishment. See *Trop* v. *Dulles, supra,* 356 U.S. at 111–112 (concurring opinion). While it may have an incidental restraining effect on some persons, its primary purpose is not to deter naturalized persons from living abroad but to remedy difficulties which thereby result for this country. Unlike the situation in the case of most penal statutes, *scienter* need not be found. Residence abroad is not criminal under any statute so that expatriation here cannot be said to provide an additional sanction for behavior already

a crime. And since residence abroad is not morally reprehensible, it is inherently unlikely that Congress would seek to punish it."

In short, there is not the slightest basis in either the legislative history or elsewhere for considering Section 352(a)(1) as penal. Consequently, it does not violate the Fifth or Sixth Amendment by failing to provide a criminal trial or impose cruel and unusual punishment in violation of the Eighth Amendment."

"Section 352(a)(1) bears no resemblance to the different expatriation provisions of the Immigration and Naturalization Act which were held penal in *Kennedy* v. *Mendoza-Martinez* and *Trop* v. *Dulles*. The legislative history of the provision before the Court in *Mendoza-Martinez*—which expatriated persons leaving the country to evade military service—strongly indicated that Congress employed expatriation as an additional penalty for conduct already criminal. 372 U.S. at 169–170, 184. And in *Trop*, this Court could find no other rational purpose for expatriating wartime deserters except to impose punishment. 356 U.S. at 97, 109.

"Appellant also argues (Br. 24–26) that Section 352(a)(1) infringes upon the "right to travel." Plainly, however, the statute does not affect the right of any person to travel where he will, when he will; it touches only prolonged *residence* in a *single* foreign country. Furthermore, even if viewed as a restriction on foreign travel, as we show in our brief in *Aptheker* v. *The Secretary of State*, No. 461, this Term, pp. 11–13, the right to travel, like all the rights protected by the due process clause, is subject to reasonable regulation by Congress. Nothing in this Court's decision in *Kent* v. *Dulles*, 357 U.S. 116, suggests that reasonable restrictions on the right to travel are beyond the power of Congress to authorize. See 357 U.S. at 127. Section 352(a)(1) is a reasonable regulation in order to prevent conflict with foreign countries and to ensure that American citizens have primary allegiance to the United States.

CONCLUSION

Appellant asks this Court to hold that Congress can make no distinction whatever between native-born and naturalized citizens. Nothing in our traditional concepts of citizenship or in our history furnishes support for such an inflexible rule. It is evident that the residence of naturalized citizens in their former homeland has a significantly different effect than the residence of other citizens abroad. The experience of this and other countries shows that such a course of conduct by the naturalized citizen is a source of international conflict. The remedy of expatriation is directly related to the problem and, we submit, within the constitutional powers of the Legislative Branch. Accordingly, the judgment below should be affirmed.

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MARCH 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964